



2025:DHC:5392



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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Judgment pronounced on: 08.07.2025

+ **ARB.P. 1341/2024**

M/S TELECOMMUNICATIONS CONSULTANTS INDIA LTD

..... Petitioner

Through: Mr. Ankit Chaturvedi, Ms. Aishwarya
Mishra and Ms. Shivani Sharma,
Advocates.

versus

M/S PREM POWER CONSTRUCTION PVT. LTD. Respondent

Through: Mr. A. P. Singh and Mr. Varhit
Vashishtha, Advocates.

CORAM:

HON'BLE MR. JUSTICE SACHIN DATTA

JUDGMENT

1. The present petition filed under section 11(6) of the Arbitration and Conciliation Act, 1996 (hereinafter referred as 'A&C Act') seeks appointment of a sole arbitrator to adjudicate the disputes between the parties.

2. The petitioner in the present petition is a Government of India Undertaking/Enterprise which is under the administrative control of the Department of Telecommunications (DOT), Ministry of Communication, Government of India and is engaged in telecommunications consultancy and execution of turnkey projects in India and abroad in the field of telecommunication for supply and installation of optical fibre network, switching systems, data communication networks etc. The respondent is a



private company incorporated under the Companies Act, 2013 having experience in execution/installation of various power transmission lines/substation projects in India and abroad.

3. The present petition is filed in backdrop of a Memorandum of Understanding dated 02.12.2002 (hereinafter referred as 'the MoU') executed between the petitioner and respondent exclusively for 'installation of power transmission lines and substations in Algeria.' In terms of the MoU, the respondent was to provide information (both non-technical and commercial) required for (i) submission of the bid/s for the installation of power lines/substation project in Algeria and (ii) technical evaluation of the said bid/s to the petitioner. The petitioner was to consider the aforementioned information for the purpose of bidding and in event of winning a tender, engage the services of respondent for installation of works under the said tender/s.

4. The petitioner on 16.12.2002 participated in Tender No. 003/DTE/ET/2002 floated by M/s Sonelgaz, an Algerian Government owned electricity and gas utility company for construction of 60kV and 220kV power transmission lines in Algeria. The petitioner was declared as a successful bidder and consequently, Contract No. 2002/080/DTE-ET/029 dated 17.03.2003 (hereinafter referred as '*the main contract*') was executed between the petitioner and M/s Sonelgaz for the aforementioned works.

5. Subsequently, on 19.06.2003, the petitioner entered into a sub-contract with the respondent for execution of civil and electrical works 'in connection with the contract for Construction of 60 kV and 220 kV lines *vide* Contract No. 2002/080/DTE-ET/029 of Sonelgaz, Algeria'. The said sub-contract contains an arbitration clause which reads as under:



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“ARTICLE 16

ARBITRATION, JURISDICTION AND GOVERNING LAWS

If any disputes and/or difference arises between the Contractor and the sub-contractor in relation to or in. connection with the Agreement, such disputes and /or differences shall be referred to arbitration. CMD, TCIL shall either be the arbitrator himself or may nominate any person to act as the arbitrator. The venue of such arbitration shall be New Delhi and the arbitration shall be governed by the Indian Arbitration and Conciliation Act, 1996.

Only the courts of New Delhi shall have the exclusive jurisdiction to entertain matters arising out of or concerning this sub-contract agreement. This agreement shall be governed by the laws of India. It is expressly agreed by the sub-contractor that performance of the sub-contract works shall continue during such arbitration proceedings.”

6. During the subsistence of the contracts (main contract and sub-contract), disputes between the parties arose whereby the petitioner alleged that it has incurred a loss due to negligence attributable to the respondent. The aforesaid loss was communicated to the respondent *vide* a letter dated 05.03.2004 which reads as under:

N	टीसीआईएल भवन, ग्रेटर कैलाश-1 नई दिल्ली-110048	TCIL Bhawan, Greater Kailash-1 New Delhi-110048
Fax No. 26891601		
No.TCIL/10/100/001/ED(IT)/2004-2005		Dated : 05.03.2004
M/s.Prem Power Construction (Pvt.) Ltd. B-2/2065, Vasant Kunj New Delhi – 110 070		
Sub: <u>Power Transmission Line Project in Algeria</u>		
Dear Sir,		
In connection with the implementation of Power Transmission Line Project of M/s. Sonelgaz Algeria, the following facts are brought to your notice for taking immediate action:-		



1. TCIL and PPCL took part in 3 lots of Sonelgaz Algeria Tender No. 003/2002/DT/ET for turnkey construction of 60/220 KV power transmission lines.
2. As per arrangement agreed, PPCL's responsibility was to survey the route and give the BOQ along with your offer for services.
3. As per terms of the MOU dated 02/12/2002, PPCL was under obligation to provide both technical and commercial information required for submission of bid (copy of MOU enclosed at Annex-I). Based on the technical information and the BOQ provided by PPCL, TCIL took the reference quotes from reputed manufacturers for materials required for this project and submitted the bid at a value of US\$ 10,381,160 for construction of 153 Kms of transmission line for lot 2.
4. TCIL became L-1 in this tender for Lot 2 and the tender was awarded to TCIL by M/s. Sonelgaz. According to terms of the MOU, the survey and works execution was entrusted to M/s. PPCL for all civil and installation works.
5. TCIL initiated the purchase as per BOQ given by PPCL. The main purchase envisaged in this project are for following materials:-
 - (a) Tower Material
 - (b) ASCR Conductors
 - (c) OPGW Cables & accessories
 - (d) Glass Insulators and other hardware accessories
 - (e) Earthing Copper Cable

6. During survey, the revised BOQ was prepared by PPCL based on the original specifications contained in the tender documents and revised length of the lines. TCIL Material Management Section, in the meantime, finalized the purchase orders and placed purchase order based on the pre-bid BOQ but the ordered quantity could not be given for want of BOQ finalization from PPCL, which was inordinately delayed.
7. PPCL ultimately submitted their interim BOQ on 02/12/2003 and some serious mistakes/discrepancies have been noticed in the BOQ as mentioned in the attached table at Annex-II. The present BOQ is also not final as some quantity is yet to be finalized by PPCL.
8. Further, due to delay in final BOQ, quantities to be purchased could not be advised to the vendors and in the meantime prices of steel have increased considerably.
9. Further, it is seen that the revised survey has reduced the executable line length and the sale price to Sonelgaz is also reduced as we are contracted to bill according to the per km of completed line. At the same time, the BOQ has not been reduced proportionately rather it is increased in some cases resulting in heavy loss to the company.
10. It is evident from the attached BOQ that your initial estimation had serious mistakes due to your negligence and it has resulted in this loss. The loss works out as under:

	In USD
a) Additional conductors (By mistake of PPCL A was estimated in place of B required)	403,945
b) Loss in tower purchase for increase in steel prices due to delayed final survey and wrong estimate	703,205
c) Loss in purchase of insulator due to wrong estimate	125,744
d) Loss in purchase of Hardware Accessories due to wrong estimate	32,179
	1,265,073

11. The above figures are as per the estimated BOQ and as & when the final BOQ is submitted by you, the same will be revised accordingly.



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We are accordingly, hereby advising you that the amount has been debited to your account which may kindly be taken note of.

Thanking you,

Yours faithfully,
For T.C.I.L.

(M. K. BASU)
EXECUTIVE DIRECTOR (IT)

Encl: 1. Annex-I
2. Annex-II

7. The allegations stated in the aforesaid communication were strenuously opposed by the respondent *vide* a letter dated 02.04.2004 wherein, *inter-alia*, it was stated as under:

Keeping the above-mentioned details in mind, we request you to kindly withdraw your notice to debit for the losses likely to be accrued to you because these are on account normal tendering risks and are because of any mis/ disinformation on our part.

In the meantime, we also request you to kindly take note of the extra expenditures which we have already incurred and are going to incur in future on the project.

We would also like to inform that incase you do not withdraw your threat to debit us we shall not be in a position to carry out any further works and this letter may kindly be treated as a request for appointment of an arbitrator.

Thanking you,
Yours faithfully,
for Prem Power Construction (Pvt) Ltd.,



8. Since the aforementioned disputes between the parties persisted, a sole arbitrator was appointed by the petitioner in terms of the clause 16 of the sub-contract for adjudication of the dispute/s between the parties. Subsequently, an Award dated 20.09.2008 (hereinafter referred as '*the first award*') was passed by the learned Sole Arbitrator. The impugned award came to be challenged before this Court under Section 34 of the A&C Act by the petitioner in OMP No. 95/2009 and the respondent in OMP(COMM)



84/2020 (registered as OMP No. 2/2009 and later renumbered). The petition filed by the respondent is still pending before this Court whereas the petition filed by the petitioner was allowed by this Court *vide* order dated 16.12.2016. The relevant portion of the said order reads as under:

“10. The Court is satisfied that the learned Arbitrator has gone beyond the binding contract between the parties in terms of Section 28 of the Act and that the Award is vulnerable and characterized as contrary to the fundamental policy of India within the meaning of Section 34(2)(b)(ii) of the Act.

11. The rejection of the remaining claims of the Petitioner is consequent upon the decision in respect of Claim No. 1 and the impugned Award in respect of the remaining claims suffers from the same defect.

12. For the aforementioned reasons, the impugned Award to the extent of rejections of claims of the Petitioner is hereby set aside. The petition is allowed but, in the facts and circumstances of the case, with no orders as to costs.”

9. The present petition is confined to those claims which are subject matter of the arbitral award dated 20.09.2008, which has been set aside (*qua* the claims of petitioner) by this Court in OMP No. 95/2009 *vide* order dated 16.12.2016.

10. It transpires that apart from the aforesaid arbitration (which culminated in the award dated 20.09.2008), there was another arbitration between the parties with regard to another set of claims under the same contract. The said award dated 30.03.2021 is the subject matter of a pending petition under Section 34 of the A&C Act [OMP(COMM) 67/2022] filed by the petitioner.

11. Learned counsel for the respondent does not dispute the existence of the arbitration agreement and accedes to appointment of a sole arbitrator to



adjudicate the disputes between the parties.¹ However, it is stated that the scope of arbitration must also subsume the counter-claims of the respondent which were subject matter of the award dated 20.09.2008 (in respect of which the respondent's petition under Section 34 of the A&C Act is still pending) and claims of the petitioner which were subject matter of award dated 30.03.2021 (in respect of which the petitioner's petition under Section 34 of the A&C Act is still pending).

12. Thus, even though the parties are mutually agreeable that an arbitral tribunal is liable to be constituted by this Court in these proceedings, there is a controversy as regards the scope of the proposed arbitral proceedings. However, the same does not inhibit this Court from exercising jurisdiction under Section 11 of the A&C Act and constituting an arbitral tribunal. The controversy as regards the scope of arbitration and/or whether any claim/s or counter claim/s are precluded on account of pending / earlier proceedings, shall necessarily be considered by the arbitral tribunal. It shall be open to the parties to make their respective submissions in this regard before the arbitral tribunal.

13. In terms of judgments rendered by the Supreme Court in ***SBI General Insurance Co. Ltd. v. Krish Spinning***, 2024 INSC 532, and ***Interplay between Arbitration Agreements under the Arbitration & Conciliation Act, 1996 & the Indian Stamp Act, 1899, In re***, 2023 SCC OnLine SC 1666, it is incumbent upon this Court to confine itself to examine *prima facie* existence of arbitration agreement between the parties and 'nothing else'.

¹ "In view of award, it is clarified that the Respondent is not objecting to appointment of Arbitrator but is merely objecting to piecemeal adjudication of dispute and is, therefore, praying for a common independent arbitrator to be appointed by this Hon'ble Court"



14. The relevant observations in ***In re, Interplay*** (supra) are as under:-

“163. The burden of proving the existence of arbitration agreement generally lies on the party seeking to rely on such agreement. In jurisdictions such as India, which accept the doctrine of competence-competence, only prima facie proof of the existence of an arbitration agreement must be adduced before the referral court. The referral court is not the appropriate forum to conduct a mini-trial by allowing the parties to adduce the evidence in regard to the existence or validity of an arbitration agreement. The determination of the existence and validity of an arbitration agreement on the basis of evidence ought to be left to the arbitral tribunal. This position of law can also be gauged from the plain language of the statute.

164. Section 11(6A) uses the expression “examination of the existence of an arbitration agreement.” The purport of using the word “examination” connotes that the legislature intends that the referral court has to inspect or scrutinize the dealings between the parties for the existence of an arbitration agreement. Moreover, the expression “examination” does not connote or imply a laborious or contested inquiry. On the other hand, Section 16 provides that the arbitral tribunal can “rule” on its jurisdiction, including the existence and validity of an arbitration agreement. A “ruling” connotes adjudication of disputes after admitting evidence from the parties. Therefore, it is evident that the referral court is only required to examine the existence of arbitration agreements, whereas the arbitral tribunal ought to rule on its jurisdiction, including the issues pertaining to the existence and validity of an arbitration agreement. A similar view was adopted by this Court in *Shin-Etsu Chemical Co. Ltd. v. Aksh Optifibre Ltd.*”

15. In ***SBI General Insurance Co. Ltd*** (supra), it has been observed as under:-

“113. Referring to the Statement of Objects and Reasons of the Arbitration and Conciliation (Amendment) Act, 2015, it was observed in *In Re: Interplay* (supra) that the High Court and the Supreme Court at the stage of appointment of arbitrator shall examine the existence of a prima facie arbitration agreement and not any other issues. The relevant observations are extracted hereinbelow:

“209. The above extract indicates that the Supreme Court or High Court at the stage of the appointment of an arbitrator shall “examine the existence of a prima facie arbitration agreement and not other issues”. These other issues not only pertain to the validity



of the arbitration agreement, but also include any other issues which are a consequence of unnecessary judicial interference in the arbitration proceedings. Accordingly, the “other issues” also include examination and impounding of an unstamped instrument by the referral court at the Section 8 or Section 11 stage. The process of examination, impounding, and dealing with an unstamped instrument under the Stamp Act is not a timebound process, and therefore does not align with the stated goal of the Arbitration Act to ensure expeditious and time-bound appointment of arbitrators. [...]”

(Emphasis supplied)

*114. In view of the observations made by this Court in In Re. Interplay, it is clear that the scope of enquiry at the stage of appointment of arbitrator is limited to the scrutiny of prima facie existence of the arbitration agreement, and **nothing else**. For this reason, we find it difficult to hold that the observations made in Vidya Drolia and adopted in NTPC v. SPML Infra Ltd. that the jurisdiction of the referral court when dealing with the issue of “accord and satisfaction” under Section 11 extends to weeding out ex-facie non-arbitrable and frivolous disputes would continue to apply despite the subsequent decision in In Re. Interplay.*

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123. The power available to the referral courts has to be construed in the light of the fact that no right to appeal is available against any order passed by the referral court under Section 11 for either appointing or refusing to appoint an arbitrator. Thus, by delving into the domain of the arbitral tribunal at the nascent stage of Section 11, the referral courts also run the risk of leaving the claimant in a situation wherein it does not have any forum to approach for the adjudication of its claims, if its Section 11 application is rejected.”

16. Moreover, it has been held by the Supreme Court in **McDermott International Inc v. Burn Standard Co. Ltd.**, (2006) 11 SCC 181, that after setting aside of an arbitral award in proceedings under Section 34 of the A&C Act, the parties are free to reinitiate arbitration, if so desired. The relevant extract from the said judgment reads as under:

“52. The 1996 Act makes provision for the supervisory role of courts, for the review of the arbitral award only to ensure fairness. Intervention of the court is envisaged in few circumstances only, like, in case of fraud or



bias by the arbitrators, violation of natural justice, etc. The court cannot correct errors of the arbitrators. It can only quash the award leaving the parties free to begin the arbitration again if it is desired. So, the scheme of the provision aims at keeping the supervisory role of the court at minimum level and this can be justified as parties to the agreement make a conscious decision to exclude the court's jurisdiction by opting for arbitration as they prefer the expediency and finality offered by it.”

17. Further, in terms of the judgments of the Supreme Court in **Perkins Eastman Architects DPC v. HSCC (India) Ltd** (2020) 20 SCC 760, **TRF Limited v. Energo Engineering Projects Ltd**, (2017) 8 SCC 377 and **Bharat Broadband Network Limited v. United Telecoms Limited**, 2019 SCC OnLine SC 547, it is incumbent on this Court to appoint an independent sole arbitrator to adjudicate the disputes between the parties.

18. Accordingly, Mr. Justice (Retd.) Najmi Waziri, former Judge, Delhi High Court (Mob. No.: +91 9810097311) is appointed as the Sole Arbitrator to adjudicate the disputes between the parties.

19. The respondent shall be at liberty to raise preliminary objections as regards arbitrability/jurisdiction, if any, which shall be decided by the arbitrator, in accordance with law.

20. The learned Sole Arbitrator may proceed with the arbitration proceedings subject to furnishing to the parties requisite disclosure as required under Section 12 of the A&C Act.

21. The learned Sole Arbitrator shall be entitled to fee in accordance with IVth Schedule to the A&C Act; or as may otherwise be agreed to between the parties and the learned Sole Arbitrator.

22. All rights and contentions of the parties in relation to the claims/counter claims are kept open, to be decided by the learned Sole Arbitrator on their merits, in accordance with law.



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23. Needless to say, nothing in this order shall be construed as an expression of opinion of this Court on the merits of the case.

24. The present petition stands disposed of in the above terms.

SACHIN DATTA, J

JULY 8, 2025/sl