Sr. No.4

IN THE HIGH COURT OF JAMMU & KASHMIR AND LADAKH AT SRINGAR

AP No. 3/2019
c/w
AA 8/2021
CM No. 5471/2021

Reserved on:09.10.2026
Pronounced on:27.10.2026
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Whether the operative part of the full judgment is pronounced? Yes.

M/s P. K. Global Trends Private Limited …Petitioner(s)/appellant(s)

Through: Mr. Shakir Haqani, Advocate.
Mr. Asif wani, Advocate

Vs.

Airport Authority of India ...Respondent(s)

Through: Mr. M. M. Dar, Advocate
Ms. Saika, Advocate
Mr. Umar Banday, Advocate

CORAM:

HON'BLE THE CHIEF JUSTICE

JUDGMENT

1. The brief facts of the case are that petitioner seeks appointment of an arbitrator under Section 11 of the Arbitration and Conciliation Act to adjudicate disputes arising out of the retail concession at Srinagar International Airport. The dispute concerns the Request for Proposal, the Letter of Intent to Award dated 9 April 2018 and the Concession Agreement dated 11 June 2018. The petitioner alleges nondisclosure and continued operation of three shops run by Jammu and Kashmir Government agencies, denial of rebate in concession fee, rejection of its

bank guarantee, disputed financial demands and refusal to constitute the arbitral forum. The respondent contends that the concession was non-exclusive, the Government shops were outside its scope, the petitioner accepted the tender risks and failed to satisfy mandatory conditions of award. It further relies on the subsequent withdrawal of the LOIA and the orders passed in the connected arbitration appeal.

2. The petitioner was awarded a seven-year retail concession at Srinagar International Airport pursuant to the tender process. The arrangement required payment of concession fee and associated charges and furnishing of the prescribed security.The respondent issued the LOIA dated 9 April 2018, and the Concession Agreement was executed on 11 June 2018. The petitioner relies on clause 7 of the LOIA and clause 10.6 of the concession terms, providing rebate for non-closure of specified licences or non-provisioning of earmarked space.

3. The petitioner alleges that three Government-agency shops continued operating despite the commercial representations underlying the award. Relying also upon the right of first refusal over additional retail space, it sought vacation of those shops or an appropriate concession-fee rebate. The respondent disputes those claims.

4. The petitioner furnished a bank guarantee issued by a cooperative bank. The respondent rejected it as inconsistent with the prescribed security requirements. The parties disagree over the consequences of that rejection and the time allowed for replacement.

5. The petitioner sought appointment of an arbitrator on 3 July 2018 and reiterated its request on 11 July 2018. The respondent refused appointment on 17 and 27 July 2018. Subsequent correspondence and meetings did not resolve the disputes. Meanwhile, the respondent

demanded concession fee, rent and other charges, which the petitioner contested. A show-cause notice proposing withdrawal of the award was issued on 30 November 2018 and answered on 1 December 2018.

6. The petitioner submits that it has taken the necessary steps for invocation of arbitration, that the respondent has repeatedly refused appointment and that this Court should appoint a sole arbitrator. It relies on the asserted conferment of jurisdiction upon courts at Srinagar and upon the location of the project there. It contends that the refusal to constitute the tribunal has caused continuing prejudice and that the respondent cannot retain control of appointment after rejecting the request and compelling recourse to Section 11. Its prayer is for appointment of a sole arbitrator and such further order as the Court considers appropriate. The petitioner has relied upon **Ebix Cash Pvt. Ltd. v. State of Maharashtra, 2024 SCC OnLine Bom 2357**, which, drawing upon **SBI General Insurance Co. Ltd. v. Krish Spinning, (2024) 12 SCC 1**, and **National Agricultural Cooperative Marketing Federation India Ltd. v. Gains Trading Ltd., (2007) 5 SCC 692**, **reiterates that an arbitration clause constitutes an agreement independent of the substantive contract and survives its termination, repudiation, frustration or breach. Relying upon these judgments, the petitioner submits that termination of the concession does not, by itself, extinguish the arbitration agreement or preclude reference of the resulting contractual disputes to arbitration.**

7. The respondent seeks dismissal on the ground that non-fulfilment of the award conditions under clause 4.2.1 of the RFP and clause 4.1 of the LOIA prevented the concession from becoming operative. It relies upon the non-exclusive character of the concession and denies that the petitioner

could require removal of other retail facilities. It also refers to the connected proceedings before the Additional District Judge and this Court.

8. The respondent relies upon the due-diligence provisions, disclaimers and clauses 6.1.1 and 6.1.2 of the Concession Agreement to submit that the petitioner independently assessed the project and accepted its commercial risks.

9. The respondent further relies upon the petitioner's unconditional acceptance of the LOIA and its tender undertakings. It maintains that the Government-agency shops predated the tender and were excluded from the concession under the applicable policy.

10. According to the respondent, all locations listed in the RFP were handed over. It contends that clause 10.6 therefore afforded no rebate and that the right of first refusal did not extend to pre-existing Government-agency shops.

11. On security, the respondent relies upon the prescribed deposit requirements and clause 5.8.2, excluding guarantees from cooperative banks. It states that the guarantee was received conditionally, subsequently rejected and returned, and that no compliant replacement was furnished despite repeated opportunities.

12. The respondent admits execution of the Concession Agreement dated 11 June 2018 but maintains that its operation remained conditional upon compliance with the award requirements. It also invokes the contractual provisions governing construction, concession fee and monthly remittance.

13. The respondent asserts that concession fee, space rent and electricity charges remained unpaid and that construction stopped and operations did not commence. It denies that the petitioner's commercial grievances suspended those obligations.

14. The respondent maintains that meetings and correspondence afforded adequate opportunity to comply. It justifies the show-cause notice and subsequent action on the grounds of deficient security, nonpayment and failure to commence operations, and asserts the contractual consequences of those defaults.

15. The respondent relies upon AAI's communication dated **26 June 2019**, withdrawing the **LOIA dated 9 April 2018** at the petitioner's cost and risk for failure to furnish the requisite bank guarantee under the RFP, LOIA and this Court's order dated **21 May 2019** in **A.A. No. 4/2019 and CM No. 3294/2019**. The communication stated that the order was forwarded on **25 May 2019**, the compliance period expired on **9 June 2019**, and no compliant guarantee was received, indicating disinterest in executing the concession and commencing retail operations. The order arose from a challenge to the Additional District Judge's order dated **30 March 2019**, keeping the show-cause communication in abeyance.

16. A bare perusal of material on record reveals that this Court after recording submissions regarding replacement guarantees at **Trichy and Bhopal**, issued notice, called for records and, subject to objections, granted two weeks to furnish a scheduled/nationalised-bank guarantee, failing which AAI could undertake fresh tendering according to the governing rules; the matter was listed on **8 July 2019**. Subsequently, by order dated **6 May 2025**, the appeal was dismissed as infructuous after recording the petitioner's noncompliance, consequent termination and both parties' submissions that the appeal no longer survived. The respondent accordingly contends that no continuing contractual foundation remains for appointment of an arbitrator.

17. The respondent relies upon **NTPC Ltd. v. SPML Infra Ltd., (2023) 9 SCC 385**, particularly paragraphs **25–28 and 29–51**, to submit that although the arbitral tribunal is ordinarily the preferred authority to determine arbitrability and contested facts, the referral court may refuse reference where the dispute is manifestly non-arbitrable or the claim is demonstrably contrived. It draws an analogy with the rejection in that case of belated allegations of coercion and economic duress following a comprehensive settlement. The decision discusses **Vidya Drolia v. Durga Trading Corpn., (2021) 2 SCC 1; BSNL v. Nortel Networks (India) (P) Ltd., (2021) 5 SCC 738; Pravin Electricals (P) Ltd. v. Galaxy Infra and Engineering (P) Ltd., (2021) 5 SCC 671; Sanjiv Prakash v. Seema Kukreja, (2021) 9 SCC 732; Indian Oil Corpn. Ltd. v. NCC Ltd., (2023) 2 SCC 539; Secunderabad Cantonment Board v. B. Ramachandraiah and Sons, (2021) 5 SCC 705;** and **DLF Home Developers Ltd. v. Rajapura Homes (P) Ltd., (2021) 16 SCC 743**, concerning the limited scope of referral scrutiny. The respondent further relies upon **Ramana Dayaram Shetty v. International Airport Authority of India, (1979) 3 SCC 489**, particularly paragraphs **8–13**, to contend that public authorities must adhere to their declared tender conditions and apply rational, fair and nondiscriminatory standards uniformly, including the prescribed bank-guarantee requirement. That decision draws upon *Vitarelli v. Seaton; A. S. Ahluwalia v. State of Punjab; Sukhdev Singh v. Bhagatram; V. Punnan Thomas v. State of Kerala; Erusian Equipment and Chemicals Ltd. v. State of West Bengal;* and *McCulloch v. Maryland* in explaining administrative fairness and the position of governmental instrumentalities.

18. After hearing the rival submissions and perusing the material on record, the moot question that arises for consideration is:

I. Issue for Determination

19. Whether the disputed liability to pay concession fee and other charges arises out of the Concession Agreement dated 11 June 2018, notwithstanding the respondent's contention that the contract never came into effect, and whether the dispute is consequently referable to arbitration through appointment of an arbitrator under Section 11 of the Arbitration and Conciliation Act, 1996?

20. The inquiry under Section 11 concerns constitution of the arbitral tribunal, rather than final adjudication of payment liability. In Duro Felguera, S.A. v. Gangavaram Port Ltd., (2017) 9 SCC 729, particularly paragraph 59, the Supreme Court emphasised the limited nature of judicial intervention and examination of the existence of an arbitration agreement covering the disputes raised.

> ***59.*** *The scope of the power under Section 11(6) of the 1996 Act was considerably wide in view of the decisions in SBP and Co. [SBP and Co. v. Patel Engg. Ltd., (2005) 8 SCC 618] and Boghara Polyfab [National Insurance Co. Ltd. v. Boghara Polyfab (P) Ltd., (2009) 1 SCC 267: (2009) 1 SCC (Civ) 117]. This position continued till the amendment brought about in 2015. After the amendment, all that the courts need to see is whether an arbitration agreement exists—nothing more, nothing less. The legislative policy and purpose is essentially to minimise the Court's intervention at the stage of appointing the arbitrator and this intention as incorporated in Section 11(6-A) ought to be respected.*

21. It is appropriate, first, to examine the contractual provision upon which the petitioner seeks constitution of the arbitral tribunal. The relevant clause of the Concession Agreement dated **11 June 2018** is required to be reproduced as follows:

22.1 Dispute and Resolution

All disputes and differences arising out of or in any way touching or concerning this Concession Agreement shall in the first place be tried through mutual consensus within the definitions and interpretations provided herein within a period of thirty (30) days from the date on which the Concessionaire has sought resolution of the dispute from Authority. If the dispute involves financial implication above Rs.7,00,000/- (Rupees seven lakhs) the Concessionaire would be free to seek Arbitration under Arbitration and Conciliation Act 1996 duly amended from time to time. The Concessionaire by means of a written application can seek appointment of an Arbitrator and Authority would appoint such an Arbitrator within 30 days of receipt of the application, subject to fulfilling the pre-requisites for appointment of the Arbitrator as laid hereunder: -

i. *The case shall be referred to the Sole Arbitrator as per AAI delegation of powers in vogue subject to the condition that the Concessionaire shall have to deposit the disputed amount with AAI as condition precedent and the consent shall have to be obtained from the concessionaire for acceptance of the recommendations of Arbitrator before making reference to the Arbitrator for adjudication of dispute.*

ii. *During the arbitral and dispute resolution proceedings, the licensee(s) shall continue to pay the full amount of license fees/dues regularly as per the LOIA/Concession agreement, unless the arbitrator decide otherwise;*

Any dispute, difference or controversy of whatever nature howsoever arising under or out of or in relation to this Agreement (including its interpretation) between the parties, and so notified in writing by either party to the other party (except those the decision whereof is otherwise herein before expressly provided for or to which the public premises (eviction of Unauthorized Occupants) Act, 1971 and the rules framed thereunder which are now enforced or which may hereinafter come into force are applicable) (the "Dispute") shall, in the first instance, be attempted to be resolved amicably through mutual consensus.

22. The petitioner's pleadings refer to disputes being referable to arbitration under the concession arrangement, while the respondent admits execution of the Concession Agreement dated **11 June 2018**, but contends that it did not become operative because the prescribed security and other conditions of award remained unfulfilled. Upon verification of the clause reproduced above, the Court must determine whether it records a binding agreement to submit the present disputes to arbitration. The respondent's admission of execution is relevant to that examination, but the existence and scope of

arbitral consent must ultimately emerge from the written contractual documents.

23. Once arbitral consent is established, the arbitration clause must be distinguished from the substantive terms governing commencement and performance of the concession. In SBI General Insurance Co. Ltd. v. Krish Spinning, (2024) 12 SCC 1, the Supreme Court explained that an arbitration agreement is independent of the other contractual terms and does not automatically perish upon termination or invalidity of the substantive contract.

24. Likewise, National Agricultural Cooperative Marketing Federation India Ltd. v. Gains Trading Ltd., (2007) 5 SCC 692, recognises survival of the arbitration agreement following repudiation, frustration or breach. These principles were applied in Ebix Cash Pvt. Ltd. v. State of Maharashtra, 2024 SCC OnLine Bom 2357, which treated disputes concerning contractual termination as referable under the agreed arbitration mechanism.

> The relevant observations from *National Agricultural Co-op. Marketing* FederationIndia *Ltd.* v. *Gains Trading Ltd.*, *2007 MhLJ Online (S.C.) 144 - (2007) 5 SCC 692* referred in the aforesaid judgment, are in para-No. 6 which reads as under:
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> > *"6. The Respondent contends that the contract was abrogated by mutual agreement; and when the contract came to an end, the arbitration agreement which forms part of the contract, also came to an end. Such a contention has never been accepted in law. An arbitration clause is a collateral term in the contract, which relates to resolution disputes, and not performance. Even if the performance of the contract comes to an end on account of repudiation, frustration or breach of contract, the arbitration agreement would survive for the purpose of resolution of disputes arising under or in connection with the contract. [Vide: Heymen v. Darwins Ltd., [1942] 1 All ER 337, Union of India v. Kishori Lai Gupta and Bros., AIR 1959 SC 1362 AND The Naihati Jute Mills Ltd. v. Khyaliram Jagannath, AIR 1968*

SC 522]. This position is now statutorily recognized. Sub-section (1) of Section 16 of the Act makes it clear that while considering any objection with respect to the existence or validity of the arbitration agreement, an arbitration clause which forms part of the contract, has to be treated as an agreement independent of the other terms of the contract; and a decision that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause. The first contention is, therefore, liable to be rejected."

25. Accordingly, the respondent's contention that the concession did not become commercially operational, or that the LOIA was subsequently withdrawn, does not by itself establish extinction of an independently concluded arbitration agreement. The consequences of failure to furnish a compliant bank guarantee, nonpayment of concession charges and non-commencement of operations may constitute substantial contractual defences. They must, however, be distinguished from an objection that the parties never agreed to arbitrate. Separability preserves an existing arbitration agreement; it cannot supply consent that the written documents do not establish.

26. The petitioner invoked arbitration by letters dated 3 and 11 July 2018. The respondent's refusals dated 17 and 27 July 2018, reiterated subsequently, support receipt of the request for the purposes of Section 21 and disclose failure to constitute the requested forum, subject to the applicable contractual prerequisites.

27. The respondent's reason for refusal was principally that the petitioner's grievances were inconsistent with the non-exclusive concession, the due-diligence obligations, the disclaimers and the prescribed conditions of award. Such refusal demonstrates disagreement over substantive entitlement; it does not amount to resolution of that disagreement. Once a binding arbitration clause covering those matters is

established, the respondent cannot finally determine the petitioner's claims merely by characterising them as unjustified. Its contractual objections remain available before the tribunal.

28. The payment demands derive their asserted foundation from the concession terms. Whether those terms became operative, whether any payment obligation accrued, and the consequences of non-fulfilment of the award conditions require interpretation of that arrangement. The respondent's contention that the contract never came into effect therefore raises a dispute concerning contractual liability; it does not, by itself, establish that an independently concluded arbitration agreement is inoperative. The contractual source of the demand must be distinguished from its ultimate enforceability, which is for the tribunal to determine.

29. In **NTPC Ltd. v. SPML Infra Ltd., (2023) 9 SCC 385**, the Supreme Court recognised the tribunal as the preferred authority for determining genuinely contestable questions and cautioned against a full examination of disputed facts at the referral stage. The apex court emphasises that doubt concerning non-arbitrability favours reference. The respondent cannot therefore obtain a final determination of competing interpretations of the concession merely by asserting that its own interpretation conclusively answers the petitioner's claims. The factual distinction from **NTPC** is also material. In the present matter, the pleaded chronology records complaints shortly after the award and requests for arbitration in July 2018. The material discussed does not establish a comparable comprehensive settlement extinguishing all disputes. The petitioner's proposal for an honourable exit was a negotiating alternative and cannot, without evidence of acceptance and concluded terms, be treated as a final discharge.

30. Furthermore, **SBI General Insurance (Supra)**, explains that referral scrutiny concerns the prima facie existence of the arbitration agreement and does not extend to a contested or laborious inquiry reserved for the tribunal. The respondent's reliance upon non-exclusivity, disclaimers, security requirements and alleged default must therefore be assessed without converting appointment proceedings into a trial of contractual liability.

31. The decision in **Ramana Dayaram Shetty v. International Airport Authority of India, (1979) 3 SCC 489**, particularly, does not require a different approach. Its insistence upon adherence to declared tender standards remains relevant to the respondent's defence, including the requirement of a compliant bank guarantee. Appointment of an arbitrator neither relaxes that requirement nor grants the petitioner exclusivity or a rebate. It provides the forum in which the parties' rights and liabilities under those very conditions may be adjudicated. Accordingly, **once the actual arbitration clause and the Court's present procedural authority to entertain the application are verified**, the pleaded correspondence supports invocation and receipt of the request for arbitration, followed by repeated refusal to appoint. The rival pleadings also disclose subsisting contractual disputes. Those circumstances furnish the basis for appointment under Section 11, subject to the applicable appointment procedure, while leaving the merits of the claims, defences and any maintainable counterclaims to the arbitral tribunal.

32. In **Union of India and Others v. N. Murugesan and Others, (2022) 2 SCC 25**, the Supreme Court explained the principle against approbation and reprobation. A party cannot ordinarily accept the benefits of an instrument while rejecting its burdens. The respondent's reliance upon contractual payment provisions must accordingly be considered with

the agreed dispute-resolution provision, without treating that conduct as a substitute for proof of arbitral consent.

33. Accordingly, in the wake of the position sketched out above, the petition is allowed. And, with consent of learned counsel for the parties, Hon'ble Mr. Justice Ali Mohammad Magrey, (**Former Chief Justice, High Court of Jammu & Kashmir and Ladakh),** is appointed as the sole arbitrator. Who shall proceed with the matter in accordance with the provisions of the Act. And to make an award within the time provided in the Act itself after charging the prescribed fee along with incidental expenses to be shared by the parties. The respondent shall be free to raise all the objections as regards the subject matter before the learned Arbitrator.

34. Registry to send a copy of this order to the learned arbitrator.

(DR. PUSHPENDRA SINGH BHATI)
CHIEF JUSTICE

SRINAGAR
20.10.2026
Aadil

Whether the judgment is reportable: Yes/No