



2024:DHC:6966



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\* **IN THE HIGH COURT OF DELHI AT NEW DELHI**  
+ O.M.P. (T) (COMM.) 88/2024 & CAV 431/2024, I.A.  
38190/2024  
POWER GRID CORPORATION OF  
INDIA LTD

.....Petitioner

Through: Mr. Sudhir Nandrajog, Sr. Adv.  
with Mr. Suriti Chowdhary, Mr. Anuj  
Bhave, Mr. Pritam Raman Giriya, Mr.  
Sudhanshu Sharma and Ms. Devna Arora,  
Advs.

versus

MIRADOR COMMERCIAL PVT LTD

.....Respondent

Through: Ms. Beenashaw N.Soni, Adv.  
with Mr. Rajesh Mahendra, Mr. Gaurav  
Kejriwal, Mr. Ankit Kohli, Ms. Sejal Jain  
and Mr. Naresh Balodia, Advs.

+ O.M.P. (T) (COMM.) 89/2024 & I.A. 38191/2024  
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INDIA LTD

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+ O.M.P. (T) (COMM.) 90/2024 & I.A. 38192/2024

POWER GRID CORPORATION OF  
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**CORAM:**

**HON'BLE MR. JUSTICE C. HARI SHANKAR**

**ORDER (ORAL)**

**06.09.2024**

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**I.A. 38190/2024 in O.M.P. (T) (COMM.) 88/2024**

**I.A. 38191/2024 in O.M.P. (T) (COMM.) 89/2024**

**I.A. 38192/2024 in O.M.P. (T) (COMM.) 90/2024**

1. Allowed, subject to all just exceptions.
2. The applications stand disposed of.

**CAV 431/2024 in O.M.P. (T) (COMM.) 88/2024**



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3. Since learned counsel for the caveator/respondent has entered appearance, the caveat stands discharged.

**IA 38681/2024 in O.M.P. (T) (COMM.) 88/2024**

**IA 38680/2024 in O.M.P. (T) (COMM.) 89/2024**

**IA 38682/2024 in O.M.P. (T) (COMM.) 90/2024**

4. One of the issues that has arisen for consideration in this case is whether the arbitration clause in the agreement between the parties is hit by the judgment of the Supreme Court in *Perkins Eastman Architects DPC v HSCC (India) Ltd*<sup>1</sup>, *Bharat Broadband Network Ltd v United Telecoms Ltd*<sup>2</sup> and *Haryana Space Application Centre (HARSAC) v Pan India Consultants Pvt Ltd*<sup>3</sup>.

5. Mr. Nandrajog, learned Senior Counsel for the petitioner would submit that it is. Ms. Beenashaw N. Soni, learned Counsel for the respondent would contend otherwise.

6. This order deliberates on the said issue and also, in the process, disposes of IA 38681/2024, IA 38680/2024 and IA 38682/2024, preferred by the petitioner in OMP (T) (Comm) 88/2024, OMP (T) (Comm) 89/2024 and OMP (T) (Comm) 90/2024 respectively.

7. These are petitions under Section 14(2) read with 14(1)<sup>4</sup> of the

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<sup>1</sup>(2020) 20 SCC 760

<sup>2</sup>(2019) 5 SCC 755

<sup>3</sup>(2021) 3 SCC 103

<sup>4</sup> 14. Failure or impossibility to act. –

(1) The mandate of an arbitrator shall terminate and he shall be substituted by another arbitrator, if –

(a) he becomes *de jure* or *de facto* unable to perform his functions or for other reasons fails to act without undue delay; and



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Arbitration and Conciliation Act 1996<sup>5</sup>, seeking termination of the mandate of the arbitral tribunal presently *in seisin* of the dispute between the parties.

**8.** The petitioner has filed IA 38681/2024, IA 38680/2024 and IA 38682/2024, in OMP (T) (Comm) 88/2024, OMP (T) (Comm) 89/2024 and OMP (T) (Comm) 90/2024, respectively, for stay of the arbitral proceedings.

**9.** I have heard Mr. Sudhir Nandrajog, learned Senior Counsel for the petitioner and Ms. Beenashaw N. Soni, learned Counsel for the respondent at some length.

**10.** The disputes between the parties arise in the context of three contract agreements dated 21 May 2010 and 25 February 2010, executed between the petitioner and a Joint Venture<sup>6</sup> of SPIC-SMO and Aster Teleservices Pvt Ltd.

**11.** The General Conditions of Contract<sup>7</sup> governing the relationship between the petitioner and respondent envisaged resolution of disputes, initially by an attempt at settlement and, on that failing, by arbitration. The relevant clauses, which are identical in the GCC in all cases, read thus:

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(b) he withdraws from his office or the parties agree to the termination of his mandate.

(2) If a controversy remains concerning any of the grounds referred to in clause (a) of subsection (1), a party may, unless otherwise agreed by the parties, apply to the Court to decide on the termination of the mandate.

<sup>5</sup> “the 1996 Act”, hereinafter

<sup>6</sup> “JV” hereinafter

<sup>7</sup> “GCC” hereinafter



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### “38. Settlement of Disputes

38.1 If any dispute of any kind whatsoever shall arise between the Employer and the Contractor in connection with or arising out of the Contract, including without prejudice to the generality of the foregoing, any question regarding its existence, validity or termination, or the execution of the Facilities, whether during the progress of the Facilities or after their completion and whether before or after the termination, abandonment or breach of the Contract, the parties shall seek to resolve any such dispute or difference, to the extent possible, amicably by mutual consultation.

38.2 If the parties fail to resolve such a dispute or difference by mutual consultation at the execution site level, then the dispute shall be referred by the Contractor to the Project Manager, who, within a period of thirty (30) days after being requested by Contractor to do so, shall give written notice of his decision.

38.2.1 The decision/instruction of the Project Manager shall be deemed to have been accepted by the Contractor unless notified by the Contractor of his intention to refer the matter for Arbitration within thirty (30) days of such decision/ instruction.

38.2.2 In the event the Project Manager fails to notify his decision as aforesaid within thirty (30) days, the Contractor, if he intends to go for Arbitration, shall notify his intention to the Project Manager within 30 days of expiry of the first mentioned period of thirty days failing which it shall be deemed that there are no dispute or difference between the Employer and the Contractor.

38.3 In case of dispute or difference between the Employer and the Contractor, if the Employer intends to go for Arbitration, he shall notify such intention to the Contractor.

### 39. Arbitration

39.1 All disputes or difference in respect of which the decision, if any, of the Project Manager and /or the Head of the Implementing Authority has not become final or binding as aforesaid shall be settled by arbitration in the manner provided herein below.

39.2 The arbitration shall be conducted by three arbitrators, one each to be nominated by the Contractor and the Employer and the third to be appointed by both the arbitrators in accordance with the Indian Arbitration Act. If either of the parties fails to appoint its arbitrator within sixty (60) days after receipt of a notice from the other party invoking the Arbitration clause, the arbitrator appointed



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by the party invoking the arbitration clause shall become the sole arbitrator to conduct the arbitration.

39.3 The language of the arbitration proceedings and that of the documents and communications between the parties shall be English. The arbitration shall be conducted in accordance with the provisions of the Indian Arbitration and Conciliation Act, 1996 or any statutory modification thereof. The venue of arbitration shall be New Delhi.

39.4 The decision of the majority of the arbitrators shall be final and binding up on the parties. In the event of any of the aforesaid arbitrators dying, neglecting, resigning or being unable to act for any reason, it will be lawful for the party concerned to nominate another arbitrator in place of the outgoing arbitrator.

39.5 During settlement of disputes and arbitration proceedings, both parties shall be obliged to carry out their respective obligations under the Contract.”

**12.** The respondent addressed a notice to the petitioner on 28 November 2016, with respect to the GCC dated 25 February 2010. The notice was issued under Clause 38 of the contract and suggested an amicable resolution of the dispute.

**13.** One of the points that Mr. Nandrajog seriously stresses is that this notice dated 28 November 2016 was only with respect to one of the three GCCs between the parties and that, therefore, there was no compliance with Clause 38 insofar as the other two GCCs dated 21 May 2010 are concerned. Ergo, submits Mr. Nandrajog, the very invocation of arbitration, in respect of the other two GCCs dated 21 May 2010 was illegal, as the stipulated pre-arbitral protocol was not followed in respect of the said GCCs. Mr. Nandrajog further submits that the stipulated recourse to an appellate remedy before the Project Manager, were conciliation to fail, has not been followed in respect of any of the three GCCs before arbitration was invoked.



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**14.** The aforesaid notice was succeeded by a notice dated 13 May 2024 issued by the respondent to the petitioner respect of all the three packages i.e. relating to all the three GCCs.

**15.** The petitioner responded to the said notice on 28 June 2024. The petitioner, in its response contended, *inter alia*, that (i) there could not be a composite arbitration for all the three packages, as they were covered by separate contracts, particulars and specific features of which were distinct and different, (ii) the claims raised by the respondent were barred by time, (iii) the invocation was bad in law as necessary and proper parties had not been impleaded, the contract having been executed with the joint venture and (iv) the remedy of an appeal to the Project Manager, in the event of a conciliation failing, had not been exhausted before arbitration was invoked.

**16.** On receipt of the aforesaid response, the respondent wrote to the petitioner on 13 May 2024, invoking arbitration in terms of Clause 39 of the GCC. The respondent claimed a principal amount of ₹ 3,33,00,000/-, apart from interest. The notice appointed Justice Iqbal Ahmed Ansari, a former Chief Justice of the High Court of Patna as the respondent's arbitrator and called upon the petitioner to nominate its arbitrator in terms of Clause 39 of the GCC.

**17.** The petitioner responded on 28 June 2024, calling upon the respondent to revoke the notice of arbitration as it was defective and premature and requiring them to approach the Project Manager before



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invoking arbitration.

**18.** The respondent, thereupon, again wrote to the petitioner on 26 July 2024, informing the petitioner that, in terms of Clause 39 of the GCC, as the petitioner had failed to nominate its arbitrator, the arbitrator named by the respondent in its Section 21 notice dated 13 May 2024 would function as the sole arbitrator arbitrating on the dispute.

**19.** This communication was also responded to, by the petitioner, on 5 August 2024.

**20.** Thereafter, on 11 August 2024, the learned arbitrator wrote to the parties, accepting his appointment and fixing the first date of hearing as 31 August 2024.

**21.** Since then, the arbitral proceedings are continuing before the learned arbitrator.

**22.** These petitions, as already noted, seek termination of the mandate of the learned arbitrator.

**23.** Mr. Sudhir Nandrajog, learned Senior Counsel has advanced the following submissions, to support the prayer:

- (i) A composite arbitration, for all the three GCCs, was not permissible in law. The specifics and even the dates of entering





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into the contracts were different. As such, the disputes would have to be individually raised in respect of each of the GCCs.

(ii) Necessary parties had not been impleaded in the matter, as the GCCs had been executed not with the individuals but with the JV.

(iii) The claims of the parties were grossly barred by time.

(iv) The Section 21 notice had been issued by the respondent without complying with pre-arbitral protocol prescribed in Clause 38 of the GCC. There was no recourse to the arbitral remedy before the Project Manager in the event of failure of conciliation. In respect of the two GCCs dated 21 May 2010, there was not even an attempt at conciliation in the first place.

(v) The appointment of the arbitrator was unilateral and was, therefore, in the teeth of the law laid down by the Supreme Court in *Perkins Eastman Architects, Bharat Broadband Network* and *Haryana Space Application Centre*, among others.

**24.** I have heard Ms. Soni, learned Counsel for the respondent specifically on the aspect of whether the appointment of the arbitrator was contrary to the law laid down in the *Perkins* line of decisions.

**25.** Ms. Soni submits that the arbitration clause in the present case is significantly different from that which was in consideration before



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the Supreme Court in the *Perkins* line of cases. Clause 39.2, she submits, is not a clause clothing one of the parties with absolute power to unilaterally appoint an arbitrator as would violate Section 12(5)<sup>8</sup> of the 1996 Act read with the law laid down in the *Perkins* line of decisions. It is a clause which envisages one of the parties appointing its arbitrator and writing to the other party to do likewise and, on the second party failing to do so, envisages the arbitrator appointed by the first party functioning as the sole arbitrator in the dispute. As such, she submits that, if the arbitrator appointed by the respondent is functioning as the sole arbitrator, it is not because the respondent has unilaterally exercised its right to appoint an arbitrator without the petitioner having any participatory role in such exercise. The petitioner, by failing to appoint its arbitrator, in response to the Section 21 notice issued by the respondent, itself condescended to the respondent's arbitrator functioning as the sole arbitrator. As such, she submits that the appointment of the arbitrator in such circumstances, does not violate the *Perkins* line of decisions.

**26.** Having heard learned counsel for both sides, I am of the opinion that the submission of Ms. Soni, regarding the vulnerability of Clause 39.2 of the GCC to evisceration as being violative of *Perkins* line of decisions merits serious consideration.

**27.** While I am not inclined to take a final view in that regard at this

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<sup>8</sup> (5) Notwithstanding any prior agreement to the contrary, any person whose relationship, with the parties or counsel or the subject-matter of the dispute, falls under any of the categories specified in the Seventh Schedule shall be ineligible to be appointed as an arbitrator:

Provided that parties may, subsequent to disputes having arisen between them, waive the applicability of this sub-section by an express agreement in writing.



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point, without calling for a response from the respondent, there is clearly a difference between the structure of the arbitration agreement as contained in Clause 39.2 with the clauses which formed subject matter of consideration in the *Perkins* line of decisions.

**28.** In this case, the clause, which was voluntarily executed by both parties, gave liberty to either party to write to the other, suggesting the name of an arbitrator. No party has been unilaterally given the right to appoint an arbitrator, without the consent of the other. On one party writing to other, naming the arbitrator, the other party has, under the arbitration clause, to respond, naming its own arbitrator.

**29.** It is only if the second party defaults in doing so that the arbitrator appointed by the first party functions as the sole arbitrator arbitrating on the disputes. As such, by defaulting in suggesting the name of its arbitrator, in response to the Section 21 notice issued by the respondent, it could be argued that the petitioner impliedly acquiesced to the arbitrator appointed by the respondent functioning as the sole arbitrator to arbitrate on the disputes. To that extent, the question of whether the appointment of the arbitrator was unilateral becomes highly debatable.

**30.** Insofar as the other arguments raised by Mr. Nandrajog are concerned, *prima facie*, these are arguments which are available to be raised before the arbitrator under Section 16 of the 1996 Act. The question of whether the disputes are time barred, or whether the respondent is entitled to raise the dispute covering all the three GCCs



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when the initial notice covered only one contract agreement, or whether the respondent was properly represented as the agreement was with the JV, and other such issues which have been raised by Mr. Nandrajog are issues which clearly fall within the remit of the arbitrator, as contemplated by Section 16(1)<sup>9</sup> of the 1996 Act.

**31.** In its recent decision in *SBI General Insurance Co Ltd v Krish Spinning*<sup>10</sup>, the Supreme Court has revisited nearly all earlier authorities on this aspect. The Supreme Court has, in no uncertain terms, held, in the interests of fostering arbitral autonomy, that the court should not extend its consideration to those issues which are available to the Arbitral Tribunal under Section 16 of the 1996 Act. As such, even while exercising jurisdiction under Section 11(6) of the 1996 Act, the Supreme Court has now held that the Court could examine only two aspects; the first being whether there exists an arbitration agreement between the parties and the second being whether the Section 11(6) petition has been filed within three years of the Section 21 notice issued by the party.

**32.** The issue of whether the dispute is arbitrable, whether it is discharged by accord and satisfaction or whether the claims are barred by time, have specifically been held by the Supreme Court to be issues which have to be relegated for decision to the arbitral tribunal. Even

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<sup>9</sup> **16. Competence of arbitral tribunal to rule on its jurisdiction. –**

(1) The arbitral tribunal may rule on its own jurisdiction, including ruling on any objections with respect to the existence or validity of the arbitration agreement, and for that purpose,—

(a) an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract; and

(b) a decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause.

<sup>10</sup> 2024 SCC OnLine SC 1754



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the aspects of whether there exists an arbitration agreement between the parties, or whether the Section 11(6) petition was filed within three years of issuance of Section 21 notice, can only be examined by the Section 11 referral court *prima facie*. If, to arrive at a conclusion on these issues, anything more than a *prima facie* examination is required, even these issues have to be relegated for decision by the arbitral tribunal.

**33.** As such, in the scenario as it exists today, issues which can be decided by the arbitral tribunal under Section 16 of the 1996 Act have to be decided by the arbitral tribunal alone, and it is only once the arbitral tribunal returns a finding on such issues that a court can exercise judicial review and take corrective steps, if necessary.

**34.** The present petitions, moreover, have been filed under Section 14 of the 1996 Act. Section 14(1) envisages the termination of the mandate of the arbitrator only in two circumstances. The arbitrator must either become *de jure* or *de facto* incapable of functioning as an arbitrator, or must withdraw from office.

**35.** In the present case, except for the arguments based on the *Perkins* line of decisions, none of the other submissions advanced by Mr. Nandrajog make out a case of the arbitrator being *de jure* incapable of so functioning. They are all issues which the arbitrator, in exercise of the jurisdiction vested in him by Section 16 of the 1996 Act, can very well decide.



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**36.** The only issue which may survive for consideration is whether the Clause 39.2 of the GCCs is hit by the *Perkins* line of decisions.

**37.** As I have already noted hereinabove, this issue is highly debatable. While, therefore, I am inclined to issue notice in these petitions, restricted to a consideration of the above issue, I do not feel that a case is made out for interdicting further arbitral proceedings presently continuing before the arbitrator appointed by the respondent. Nonetheless, it is made clear that all further proceedings in the arbitration would remain subject to outcome of this petition.

**38.** As the issue that survives for consideration in these petitions is limited, issue notice.

**39.** Notice is accepted on behalf of respondent by Ms. Beenashaw N. Soni.

**40.** Reply, if any, be filed within three weeks with advance copy to learned Counsel for the petitioner who may file rejoinder thereto, if any, within one week thereof.

**41.** List for disposal on 23 October 2024.

**42.** No extension of time for filing of reply or rejoinder shall be granted.

**43.** IA 38681/2024, IA 38680/2024 and IA 38682/2024 seeking



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stay of continuation of the arbitral proceedings are dismissed.

**C. HARI SHANKAR, J.**

**SEPTEMBER 6, 2024**

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*Click here to check corrigendum, if any*