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ARBITRATION AND CONCILIATION

Arbitral Tribunal Alone Decides Who May Invoke Arbitration, Supreme Court Reiterates

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The Supreme Court has dismissed two connected civil appeals arising out of orders dated 17 February 2023 passed by the High Court for the State of Telangana at Hyderabad under Section 11(6) of the Arbitration and Conciliation Act, 1996. The judgment, reported as 2025 INSC 1447, clarifies the narrow scope of judicial scrutiny at the referral stage and holds that the question whether an individual consortium member may singly invoke an arbitration clause is a substantive plea to be decided by the arbitral tribunal under Section 16 of the Act.

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Factual backdrop

Andhra Pradesh Power Generation Corporation Limited ("APGENCO") floated a tender in 2010 for an EPC package at the Rayalaseema Thermal Power Plant open only to consortium bidders. A consortium comprising M/s. Tecpro Systems Limited (1st respondent), M/s. VA Tech Wabag Limited and M/s. Gammon India Limited was formed on 17 August 2010, designating Tecpro as leader. The Letter of Intent dated 30 October 2010 and three Purchase Orders dated 15 December 2010 were issued in favour of the consortium and expressly incorporated the General Conditions of Contract ("GCC"), which contained Clause 22.2 an arbitration clause.

Execution faltered; VA Tech assumed Tecpro's scope and became lead member in April 2014. Tecpro was later admitted into Corporate Insolvency Resolution Process on 7 August 2017. APGENCO, blaming Tecpro for delay, addressed a show-cause letter on 4 October 2017. Tecpro denied default and, by communications of 11 December 2017 and 3 April 2018, claimed roughly ? 1,951 crore while formally invoking arbitration and nominating a former Supreme Court judge as its arbitrator. APGENCO maintained silence; Tecpro approached the Telangana High Court under Section 11(6). The High Court appointed the tribunal, holding that an arbitration agreement prima facie existed and that Tecpro's capacity to invoke it alone was a question for the arbitrators. APGENCO and VA Tech thereupon filed the present appeals.

Rival contentions

Appellants' position

Counsel for APGENCO and VA Tech submitted that the arbitration agreement is enforceable only by the consortium as a collective entity. Clause 1.1.63 of the GCC defines "Parties" as the "Purchaser" (APGENCO) and the "Contractor", defined in turn as "the person whose tender has been accepted and the legal successors in title to such person". Read with the Purchase Orders' and the exclusive court jurisdiction clause, the scheme shows that individual members lack standing. Reliance was placed on Delhi High Court decisions in Consulting Engineers Group Ltd. v. NHAI (2022 SCC OnLine Del 3253) and Bombay High Court authority in MSEDCL v. Godrej & Boyce (2019 SCC OnLine Bom 3920) for the proposition that a single consortium member cannot invoke arbitration without the others' consent. It was further argued that Tecpro's insolvency and cessation of leadership in 2014 disentitle it from unilateral action; the Group of Companies doctrine is inapplicable after Cox & Kings Ltd. v. SAP India Pvt. Ltd. (2024) 4 SCC 1; and the distinction drawn in ASF Buildtech Pvt. Ltd. v. Shapoorji Pallonji & Co. Pvt. Ltd. (2025) 9 SCC 1 between "existence" and "capacity" mandates rejection of the reference.

Respondent's stand

Tecpro, contended that the GCC arbitration clause travels with the Purchase Orders by incorporation. An un-incorporated consortium is not a juristic person (New Horizons Ltd. v. UoI (1995) 1 SCC 478; Dulichand Laxminarayan Firm v. CIT (1956) 1

SCC 269); members retained severable scopes and separate payment streams. Clause 16(d) of the Consortium Agreement dissolves the consortium ipso facto on a member's insolvency, whereupon each party represents itself. Identical objections had already been repelled by the Supreme Court in connected TSPGCL proceedings (order dated 29 November 2021). Capacity, mis-performance and counter-claims are for the tribunal, not for a Section 11 court.

Issues framed

1. Whether an individual consortium member is a "party" entitled to invoke Section 11 when the arbitration clause is addressed to the "Contractor" consortium.
2. Whether the referral court may enquire into contractual capacity beyond the prima facie existence of the arbitration agreement.
3. Whether post-CIRP status or loss of leadership disables a member from seeking arbitration.

Legal provisions and judicial precedents

The Court anchored its reasoning on Sections 7, 11(6-A) and 16 of the Arbitration Act, reinforced by Duro Felguera S.A. v. Gangavaram Port Ltd. (2017) 9 SCC 729, the Constitution Bench opinion "Interplay Between Arbitration Agreements under the Arbitration Act, 1996 and the Stamp Act, 1899" (2024) 6 SCC 1, SBI General Insurance Co. Ltd. v. Krish Spinning Mills Pvt. Ltd. (2024) 12 SCC 1, Goqii Technologies Pvt. Ltd. v. Sokrati Technologies Pvt. Ltd. (2025) 2 SCC 192 and Managing Director, Bihar State Food & Civil Supplies Corpn. v. Sanjay Kumar (2025) INSC 1604. Cox & Kings Ltd. v. SAP India Pvt. Ltd. (2024) 4 SCC 1 was relied upon to affirm kompetenz-kompetenz and to hold that non-signatory issues are for the tribunal.

Analysis

The bench reiterated the statutory policy of minimal judicial intervention post the 2015 amendment. Section 11(6-A) requires only a prima facie examination of the existence of an arbitration agreement; questions of capacity, joinder or non-signatory involvement are reserved for the tribunal under Section 16. The appellants' plea that "no agreement exists with Tecpro individually" conflates existence with entitlement, a conflation the tribunal alone can resolve after evaluating the Consortium Agreement, the 2014 leadership change, the impact of CIRP and the actual flow of payments. The Delhi and Bombay High Court decisions were distinguished as fact-specific, while the Court's own 2021 TSPGCL order had already traversed an identical contractual terrain. Prima facie, Clause 22.2 is part of the concluded contract and Tecpro, having executed works and raised invoices, can be regarded as a party for referral purposes.

Final disposition

The appeals are dismissed; the High Court's constitution of the arbitral tribunal was upheld. All objections including whether Tecpro's individual invocation is maintainable, whether the consortium survives, whether other members' consent is required, and whether pending liquidation affects the claim are remitted to the sole arbitrator (Justice Madan B. Lokur, former Judge of the Supreme Court) for final determination under Section 16 in accordance with the directions already issued on 29 November 2021. No order as to costs.

Conclusion

2025 INSC 1447 restates the gate-keeping function of Indian referral courts and signals that disputes touching upon the internal governance of consortia, leadership changes or post-insolvency authority are substantive questions to be ventilated before the arbitral tribunal. Drafting parties would do well to spell out, in advance, who may invoke arbitration, the effect of a member's insolvency and the continuing or dissolving character of the consortium if they wish to avoid parallel litigation on arbitrability.

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