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

Decided on: 02.04.2024

\+ **O.M.P. (COMM) 455/2022 & I.A. 18565/2022**

NATIONAL HIGHWAY AUTHORITY OF INDIA ..... Petitioner

Through: Mr. Ankur Mittal, Mr. Abhay Gupta & Mr. Ankur Saboo, Advocates. [M:-9958500980]

versus

MS IRB AHMEDABAD VADODRA SUPER EXPRESS TOLLWAYS PVT. LTD ..... Respondent

Through: Mr. Atul Nanda, Senior Advocate with Ms. Rameeza Hakim, Mr. Saket Sikri, Mr. Anirudh Bakhru, Ms. Teresa Daulat, Mr. Mohanish Patkar, Mr. Raj Adhia, Ms. Devika Mohan, Ms. Charu Shriyam Singh, Ms. Pragya Gautam, Mr. Martand Singh, Ms. Vartika Singh, Mr. Sarthak Sachdev & Mr. Vatan Sharma, Advocates.

CORAM:
HON'BLE MR. JUSTICE PRATEEK JALAN

PRATEEK JALAN, J. (ORAL)

1. By way of this petition under Section 34 of the Arbitration and Conciliation Act, 1996 ["the Act"], the petitioner- National Highway Authority of India ["NHAI"] assails a decision of a three-member Arbitral Tribunal dated 01.08.2022 [corrected on 02.08.2022] by which the learned Arbitral Tribunal has rejected an application filed by the petitioner under Order I Rule 10 of the Code of Civil Procedure, 1908 ["CPC"], for impleadment of the State of Gujarat as party to the arbitral

proceedings.

2. The arbitral proceedings were instituted by the respondent herein, seeking adjudication of disputes under a Concession Agreement dated 25.07.2011 ["the Concession Agreement"] between the petitioner and the respondent. The respondent filed its claims and the petitioner filed counter claims before the learned Arbitral Tribunal.

3. During the course of the arbitration proceedings, the petitioner moved an application under Order I Rule 10 of the CPC seeking impleadment of the State of Gujarat on the ground that the State was party to a State Support Agreement dated 11.02.2016 which placed certain obligations upon it with respect to the Concession Agreement. By the impugned decision dated 01.08.2022, characterised by the petitioner as an "*interim award*", the learned Arbitral Tribunal has rejected the application on the ground that it did not have jurisdiction to decide the question of impleadment of the State of Gujarat.

4. A preliminary objection has been raised by the respondent that the impugned decision does not constitute an "*award*" at all, so as to attract the jurisdiction of this Court under Section 34 of the Act. I have heard Mr. Ankur Mittal, learned counsel for the petitioner, and Mr. Atul Nanda, learned Senior Counsel for the respondent, on this point.

5. Factually, the submission of Mr. Mittal is that the Concession Agreement, and similar Agreements between the petitioner and other concessionaires, expressly contemplated the execution of a State Support Agreement with the State of Gujarat and that the petitioner entered into the State Support Agreement pursuant to such provisions. The concerned concessionaires, including the respondent herein, were, however,

admittedly not parties to the State Support Agreement between the petitioner and the State of Gujarat. However, it is Mr. Mittal's contention that the Concession Agreement and the State Support Agreement constitute part of a composite set of documents in relation to the same project and the State of Gujarat, essentially, bound itself to certain obligations *qua* the respondent under the Concession Agreement. As such, Mr. Mittal contends that the State of Gujarat was effectively a party to the Concession Agreement and ought to have been impleaded in the arbitral proceedings.

6. On the point of maintainability of this petition, Mr. Mittal submits that the impugned decision purports to proceed on a point of jurisdiction, but decides a question which has the effect of exonerating the State of Gujarat of any potential liability under the Concession Agreement. It, thus, partakes of the character of a final and substantive decision, which would be amenable to challenge as an interim award. Mr. Mittal cites the judgments of Supreme in *Indian Farmers Fertiliser Cooperative Ltd. vs. Bhadra Products ["IFFCO Ltd."]*[1] and *Oil and Natural Gas Corporation Ltd. vs. Discovery Enterprises Pvt. Ltd.*[2] and a Coordinate Bench decision of this Court in *Cinevistaas Ltd. vs. Prasar Bharti*[3] in support of this contention. However, he has also rightly drawn my attention to the judgment of this Court in *National Highway Authority of India vs. Lucknow Sitapur Expressway Ltd.* ["*Lucknow Sitapur Expressway*"][4], which proceeds on facts substantially similar to the present case.

[1] (2018) 2 SCC 534.
[2] (2022) 8 SCC 42.
[3] 2019 SCC OnLine Del 7071.
[4] 2022 SCC OnLine Del 4527.

7. Mr. Nanda submits that the question of maintainability of a petition under Section 34 of the Act against an order of an arbitral tribunal declining impleadment of a third party is no longer *res integra*. He relies upon the decision in *Lucknow Sitapur Expressway*[5], as also a Division Bench judgment of this Court in *Goyal MG Gases Pvt. Ltd. vs. Panama Infrastructure Developers Pvt. Ltd. & Ors.* ["Goyal MG Gases"][6].

8. Having heard learned counsel for the parties, I am of the view that the present case is covered against the petitioner by the decision in *Lucknow Sitapur Expressway*[7]. The Court was, in that case, also concerned with a decision of an arbitral tribunal adjudicating disputes under a Concession Agreement. The Tribunal had rejected an application by NHAI for impleadment of a State Government on the ground that it was a party to a State Support Agreement[8]. In *Lucknow Sitapur Expressway*[9], this Court referred to various decisions of the Supreme Court and of this Court, including *Chloro Controls India Pvt. Ltd. vs. Severn Trent Water Purification Inc. and Ors.*[10], and *Rhiti Sports Management Pvt. Ltd. vs. Power Play Sports & Events Ltd.* ["Rhiti Sports"][11] to come to the conclusion that rejection of the application of NHAI for impleadment of the State did not constitute an "*award*" at all. It, therefore, dismissed the petition under Section 34 of the Act. The

[5] Supra (note 4).
[6] 2023 SCC OnLine Del 1894.
[7] Supra (note 4).
[8] There is a small factual distinction between the case of *Lucknow Sitapur Expressway* and the present case, which is that the State Support Agreement in *Lucknow Sitapur Expressway* was a tripartite agreement to which the concessionaire was also a party, whereas, in the present case, the State Support Agreement is between NHAI and the State of Gujarat alone. This distinction, if at all relevant, makes the case of NHAI even more precarious in the present case.
[9] Supra (note 4).
[10] (2013) 1 SCC 641.

relevant observations of the Court are as follows:

> "*16. The Court, at the outset, notes that* ***the order which stands impugned in the present petition does not decide a fundamental question or a substantive dispute that may be said to form the subject matter of arbitration.*** *The Arbitral Tribunal has also not ruled upon any claim which may have been raised by parties. For an order of the Tribunal to be understood as an award, it is essential that it answer the attributes of a decision touching upon the merits of the dispute between the parties or conclusively settling an issue or answering a question which pertains to the heart of the dispute. An order of the Arbitral Tribunal, to put it differently, in order to constitute an award, interim or otherwise, would be one which decides a substantive dispute or question which exists between the parties. In order to qualify as an award, the decision must be with respect to an issue which constitutes a vital element of the dispute.*
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> *17. As was correctly explained by the Court in Rhiti Sports, in order to hold that an order passed by the Tribunal has the attributes of an award, it would have to be established that the same decides "matters of moment" or disposes of a substantive claim raised by parties. This has been duly recognised by precedents as well as the authoritative texts noticed in Rhiti Sports, as orders which effectively conclude a fundamental dispute or question that stands raised on merits as distinguished from mere procedural orders.*
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> *18.* ***As this Court views and considers the order of the Tribunal impugned herein, it is of the firm opinion that the same fails to answer the attributes of an award as is understood under the provisions of the Act.*** *The order impugned neither finally decides a question touching upon the merits of the respective claims nor does it decisively conclude a dispute which exists between the parties. The impugned order also fails to answer to the attributes of a determination of an issue which could be said to have a bearing on the ultimate reliefs sought by parties. The respondent would still have to establish whether the concession period is liable to be extended in light of the provisions contained in the C.A. Whether the expressways alluded to would constitute competing roads would also be a question which would be open to be agitated before the Arbitral Tribunal. That Tribunal would still have to consider and decide whether the claim would sustain in terms of Clause VIII.*
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> *19. While learned counsel advanced elaborate submissions with respect to non-signatories being bound by an arbitration agreement and the "group of companies" and "alter ego" principles as enunciated in various decisions, he failed to bear in mind that the*

[11] 2018 SCC OnLine Del 8678.

> *objection of a necessary party having not been arrayed as a party and its ultimate impact on the relief claimed, would be one which would still be open to be urged before the Arbitral Tribunal. The Court further finds that the Arbitral Tribunal has noted that the respondent who is the claimant has "dominus litus". It would thus continue to carry the burden of proving that the ultimate relief sought under Claim No. 6 is liable to be granted against the petitioner. These and other issues would be available to be asserted before the Arbitral Tribunal notwithstanding the non-impleadment of the State of U.P.*
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> *20. The Court ultimately comes to conclude that the petitioner has woefully failed to establish that the impugned order amounts to the Arbitral Tribunal recording a finding which touches upon the heart of the dispute or that it decides an issue which impacts substantive rights of parties. It would clearly not amount to an "arbitral award" within the meaning of Section 2(1)(c) of the Act.*
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> *21. In view of the aforesaid, the Court finds substance and merit in the preliminary objection which is raised and comes to the definitive conclusion that the order impugned cannot possibly be understood to be an award which may be open to be assailed under Section 34 of the Act."*[12]

9. The only distinction between the said case and the present case, sought to be urged by Mr. Mittal, is that in the present case, the Tribunal has come to the conclusion that it did not have "*jurisdiction*" to decide the application, whereas in *Lucknow Sitapur Expressway*[13], the arbitral tribunal had rejected the application on merits. Mr. Mittal sought to invoke the principles which govern Section 16 of the Act, relating to competence of the arbitral tribunal to rule on its own jurisdiction, to suggest that the tribunal's decision, in effect, partakes the character of a substantive ruling on merits. However, such a distinction does not commend to me for the reason that the impugned decision still amounts to rejection of the petitioner's application for impleadment of the State, and no more. As elaborately discussed by the Supreme Court in *IFFCO*

[12] Emphasis supplied.

Ltd.[14], questions of jurisdiction can rise in a variety of contexts. In the words of the Supreme Court, ""*jurisdiction" is a coat of many colours and that the said word displays a certain colour depending upon the context in which it is mentioned*"[15]. In the impugned decision, the learned Tribunal has not ruled upon its jurisdiction to adjudicate any substantive claims, but only upon its jurisdiction to hear and decide the application under Order I Rule 10 of the CPC. Whether the view taken by the Tribunal is on maintainability, as in the present case, or on merits, as in *Lucknow Sitapur Expressway*[16], does not, in my view, make a difference as to the characterisation of the decision as an award. In fact, Mr. Mittal's argument would lead to the anomalous result that rejection of an application for impleadment on a preliminary point of maintainability would constitute a substantive decision in the nature of an "*interim award*", whereas rejection of the very same application after a hearing on merits thereof, would not. Such a position is untenable.

10. The decision of the Division Bench in *Goyal MG Gases*[17] also lends support to the aforesaid view. The Division Bench was hearing an appeal against an order of a learned Single Judge dismissing a petition under Section 34 of the Act, which sought to challenge an order of the arbitral tribunal rejecting an application for impleadment of third parties. The learned Single Judge had dismissed the petition under Section 34 of the Act on maintainability as well as on merits. On the question of

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[13] Supra (note 4).
[14] Supra (note 1).
[15] Ibid, paragraph 21.
[16] Supra (note 4).
[17] Supra (note 6).

maintainability, it was held that the application praying for impleadment of third party was not a matter which would dovetail into the final award. Affirming this reasoning, the Division Bench referred with approval *inter alia* to the decisions of learned Single Judges in *Rhiti Sports*[18] and *Lucknow Sitapur Expressway*[19].

11. In view of the fact that the decision in *Lucknow Sitapur Expressway*[20] is, in my view, indistinguishable from the present case, it is not necessary to deal with the other judgments cited by Mr. Mittal.

12. For the reasons aforesaid, I am of the view that the present petition under Section 34 of the Act is not maintainable. The petition is, therefore, dismissed. All pending applications also stand disposed of.

13. It may be mentioned that the arbitral proceedings have been concluded in the meantime, and the award has been reserved. It is made clear that this decision will not prejudice any arguments available in law to the petitioner in the event the award is against it.

PRATEEK JALAN, J

APRIL 2, 2024
'pv/Adhiraj'/

[18] Supra (note 11).
[19] Supra (note 4).
[20] Supra (note 4).