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

\+ O.M.P. (COMM) 224/2021 and I.A. 9860/2021

NATIONAL HIGHWAYS AUTHORITY OF INDIA ..... Petitioner

Through Ms. Aishwarya Bhati, ASG with Ms. Neetica Sharma and Mr. Nitin Chowdhary, Advs.

versus

M/S ABHIJEET ANGUL SAMBALPUR TOLL ROAD LIMITED ..... Respondent

Through Mr. Sandeep Bajaj, Devansh Jain and Vipul Jai, Advs.

JUDGMENT(ORAL)

% 28.02.2022

(By Video Conference on account of COVID-19)

C .HARI SHANKAR, J.

1. This petition under Section 34 of the Arbitration and Conciliation Act, 1996 ("the 1996 Act"), assails para 6.1.7 of order dated 26th August, 2020 passed by the majority of the learned Arbitral Tribunal, which consisted of three members, whereby the learned Arbitral Tribunal has held that it would not entertain or adjudicate any of the counter-claims raised by the petitioner-NHAI *vide* its application dated 4th February, 2020 except the counter-claim for ₹12.2 crores. The impugned para 6.1.7 reads thus:

> "6. 1.7 It is seen that the AT had allowed the Respondent to file a CounterClaimfor the amount of Rs.12.2 Crores only, as

claimed through theirapplication dated 04.02.2020.

However, the Respondent nave filedthree Counter-Claims.

The two Counter-Claims besides the Counter-Claim for Rs. 12.2 Crores have been filed without any authority.

The AT reiterates that it wilt adjudicate only one Counter-Claim forRs.12.2 Crores as per liberty allowed to the Responding for filing theparticular Counter-C1aim.

The-AT shall not entertain and adjudicate-other Counter-Claims."

2. The impugned majority decision proceeds on the premise that the learned Arbitral Tribunal had, *vide* its earlier order (dated 24th September, 2019) allowed NHAI to file a counter-claim "for the amount of ₹ 12.2 crores *only*".

3. From a reading of the order dated 24thSeptember, 2019 passed by the learned Arbitral Tribunal, it is clear that this assumption of the learned Arbitral Tribunal is actually predicated on a misreading of the order dated 24th September, 2019. The order dated 24th September, 2019, which was passed by the learned Arbitral Tribunal on an application by the NHAI under Section 17 of the 1996 Act, does not state that the petitioner would file a counterclaim *only* for an amount of ₹12.2 crores. For ready reference, the entire order dated 24th September, 2019 is reproduced thus:

"**BEFORE THE ARBITRAL TRIBUNAL COMPRISING OF**

Shri O.P. Goel **PRESIDING ARBITRATOR**

Shri Sudesh Dhiman **ARBITRATOR**

Shri K.K. Singal ARBITRATOR

IN THE MATTER OF ARBITRATION BETWEEN

M/s Abhijeet Angul Sambalpur Toll Road Limited. ..... Claimant/Concessionaire

And

National Highways Authority of India ..... Respondent/Employer

24.09.2019

Sub: Four Laning of Angul-Sambalpur Section of NH-42 from Km 112.00 toKm 265.00 in the State of Orissa under NHDP-IV to be executed asBOT (Toll) on DBFOT Pattern. Concession Agreement dated13.03.2012

Re: Application under Section 17 of the Arbitration & Conciliation Act, 1996on behalf of National Highways Authority of India (Respondent)seeking withdrawal of money towards bank guarantee deposited withState Bank of India Nagpur in the High Court of Delhi along withinterest accrued thereon w.e.f. 20.09.2013.

The Respondent has filed an Application under Section 17 of the Arbitration& Conciliation Act, 1996 on 04.02.2019. The Claimant filed their reply to theapplication vide letter dated 02.03.2019. The Respondent did not want tofile their rejoinder. Arguments were presented by the parties during hearing.Both parties filed their Brief Notes.

Respondent's case:

1. As per Concession Agreement, the Claimant was required to submit aperformance guarantee of Rs.61 crores. This has not been done. Thereasons advanced by the Claimant for not furnishing performanceguarantee are not relevant. Against the request of extension of timefor 120 days for submission of the performance guarantee, period of7 days was allowed by the Respondent. Despite thatthe performanceguarantee was not furnished.

2. The Claimant filed an application before Hon'ble High

Court of Delhiseeking stay on encashment of the bank guarantee (bid security) ofRs. 12.2 crores available with the Respondent. The Hon'ble High Courtstayed the invocation of bank guarantee till final orders. The HighCourt decided on 22.8.2013 to get the money deposited in the court.On the money being deposited with the Registry of the Court, theRegistry will invest the same in an interest bearing fixed deposit.Thefinal orders of the Hon'ble High Court were passed on 16.09.2013subject to the conditions: (i) The Concessionaire would keep thebank guarantee alive during the pendency of the Petition and to invokearbitration within 10 days. (ii) The captioned petition will be placedbefore the Arbitrator who will treat the same as an application u/s 17of the Act and decide the same in accordance with law. (iii) Bothparties are free to prefer their claim and counter claims if any. (iv)The money deposited in the court will abide by the order of theArbitrator (v) The arbitrator will be at liberty to pass an appropriateorder in accordance with qua the application u/s 17 of the Act (vi) Incase the Respondent is aggrieved by any acts of commission oromission of the Petitioner and in that behalf seeks to exercise its rightunder the agreement, the Respondent will be free to do so.

3. The Respondent has in reply to claim No.6 of the Claimant requestedthat the-said amount be released in favour of the Respondent.

4. The Respondent has prayed:

a. Allow the present application;

b. Allow the Respondent to withdraw an amount of Rs.12.2 crorestowards bank guarantee deposited by the State Bank of India,Nagpur branch in the High Court of Delhi along with interestaccrued thereon w.e.f. 20.09.2013;

c. Pass any further order (s).

Claimant's case

1. The relief prayed by the Respondent cannot be claimed or grantedunder Section 17 of the Act.

2. The Claimant has made a claim No. 6 for this amount, which isunder adjudication.

3. No counter claim has been made by the Respondent.

Findings of AT:

1. AT has carefully gone through the arguments and submissionsmade by both the parties.

2. The Claimant have claimed the amount of Rs.12.2 crores andinterest therein as deposited in the Hon'ble High Court of Delhiunder Claim No.6.

3. The Respondent has not put any counter claim but in the reply toClaim No.6, has claimed this amount.

4. Section 17 of the Act provides:

> 1. Unless otherwise agreed by the parties, the AT may, at therequest of a party, order a party to take any interim measureof protection as the AT may consider necessary in respect ofthe subject matter of the dispute.
>
> 2. The AT may require a party to provide appropriate security inconnection with a measure ordered under sub section (1).

5. AT finds that the prayer of the Respondent is not for any interimmeasure of protection but to allow the Respondent to withdrawthe amount deposited with the Court.

6. Interim measure of protection of the amount of bid security hasalready been allo.wed by the Court under Section 9 petition. Theamount is lying protected and has to be utilized or apportioned asper final decision of the AT. The AT does not consider necessaryto give any fresh order of interim measure of protection other thancontinuing the order of the Hon'ble High Court.

7. The Respondent has not asked for any interim measure ofprotection but an interim award. No counter claim has been lodgedby the Respondent other than making an indirect statement in thereply to Claim NO.6. The AT considers that the

Respondent if itso likes, may file a counter claim for this amount, which can beadjudicated.

8. The AT does not find any substance in the application made.

Decision:

1. In view of the above facts, the prayer made by theRespondent cannot be accepted.

2. Interim measure of protection ordered by the Hon'ble HighCourt are already in place and will continue so till theadjudication of the matter by the AT.

3. The Respondent is allowed liberty to file a counter claim, ifso desire, within a period of one month.

Sd.	Sd.	Sd.
(Sudesh Dhiman)	(O.P. Goel)	(K.K. Singal)
Arbitrator	Presiding Arbitrator	Arbitrator

Dated: 24.09.2019"

4. Clearly, the order dated 24th September, 2019, while it grants liberty to the petitioner to prefer a counter-claim for the amount of ₹12.2 crores, in connection with which NHAI had moved the Section 17 application, *does not restrict the right of NHAI to file any other counter-claim*. Ms. Aishwarya Bhati, learned Additional Solicitor General has candidly submitted that the Arbitral Tribunal would have been within its authority in rejecting the counter-claims other than the counter-claim for ₹12.2 crores on any other ground subject, of course, to the right of NHAI to contest the same. She submits, however, that the learned Arbitral Tribunal could not take a view that it would not entertain any other counter-claim, save and except the counter-claim for ₹12.2 crores.

5. The only ground on which the learned Arbitral Tribunal has declined to entertain the counter-claims preferred by the petitioner's application dated 4th February, 2020, except for the counter-claim of ₹12.2 crores, is the presumption that the right to file counter-claim, as extended to the petitioner by the earlier order of the learned Arbitral Tribunal, was *only* in respect of the counter-claim for₹12.2 crores. This, as is apparent, is not the actual position.

6. The right of the petitioner to file counter-claims exists independent of any liberty granted by the learned Arbitral Tribunal. It is always open to the learned Arbitral Tribunal to reject the counter-claims either on merits or on limitation or even on the ground that they are not arbitrable within the scope of the reference made to learned Arbitral Tribunal, in exercise of the powers conferred by it by Section 16 of the 1996 Act[1], which empowers an Arbitral Tribunal to rule on its own jurisdiction.The learned Arbitral Tribunal could not, however,

[1]**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.

(2) A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence; however, a party shall not be precluded from raising such a plea merely because that he has appointed, or participated in the appointment of, an arbitrator.

(3) A plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings.

(4) The arbitral tribunal may, in either of the cases referred to in sub-section (2) or sub-section (3), admit a later plea if it considers the delay justified.

(5) The arbitral tribunal shall decide on a plea referred to in sub-section (2) or sub-section (3) and, where the arbitral tribunal takes a decision rejecting the plea, continue with the arbitral proceedings and make an arbitral award.

(6) A party aggrieved by such an arbitral award may make an application for setting aside such an arbitral award in accordance with section 34.

take a view that it would not entertain any such counter-claim, if preferred before it.

7. Mr. Sandeep Bajaj, learned counsel for the respondent, has contested the maintainability of the present petition. He submits that the impugned order cannot regarded as "interim award", so as to make a petition under Section 34, challenging the order, maintainable.

8. Decisions of the Arbitral Tribunal are amenable to challenge, before the Court, either under Section 34 or under Section 37 of the 1996 Act. Section 37 envisages appeals against orders passed by the Arbitral Tribunal. Of these, direct appeals from a decision of the Arbitral Tribunal are covered by Section 37(2), and lie against orders either accepting applications under Section 16(2)(3) or granting or refusing to grant an interim measure under Section 17. As such, orders which do not fall within one or the other of the aforesaid sub clauses of Section 37(2) would not be amenable to challenge by way of appeal.

9. Section 34 of the 1996 Act allows recourse to a Court against any "arbitral award". "Arbitral award" is defined in Section 2(1)(c) as including an interim award.

10. "Interim award" is, however, not defined in the 1996 Act. Section 31(6) of the 1996 Act, however, empowers an Arbitral Tribunal to make an interim award on any matter with respect to which it may make a final arbitral award. Section 31(6) of the 1996

Act reads thus:

> "The arbitral tribunal may, at any time during the arbitral proceedings, make an interim arbitral award on any matter with respect to which it may make a final arbitral award."

11. Inasmuch as an interim award is also an "arbitral award" as defined in Section 2(c), an interim award would be susceptible to challenge under Section 34 of the 1996 Act. This fact was noticed by the Supreme Court in ***Indian Farmers Fertilizer Cooperative Ltd v. Bhadra Products***[2](***IFFCO***, hereinafter). The issue before the Supreme Court, in that case, was whether an order rejecting a claim on the ground of limitation, could be treated as "interim award", so as to make the order amenable to challenge under Section 34 of the 1996 Act. The Supreme Court, in ***IFCO***[2], while noticing that the 1996 Act does not define "interim award", proceeded to opine as under:

> "7. As can be seen from Section 2(c) and Section 31(6), except for stating that an arbitral award includes an interim award, the Act is silent and does not define what an interim award is. We are, therefore, left with Section 31(6) which delineates the scope of interim arbitral awards and states that the arbitral tribunal may make an interim arbitral award on any matter with respect to which it may make a final arbitral award."
>
> 8. The language of Section 31(6) is advisedly wide in nature. A reading of the said sub-section makes it clear that the jurisdiction to make an interim arbitral award is left to the good sense of the Arbitral Tribunal, and that it extends to "any matter" with respect to which it may make a final arbitral award. The expression "matter" is wide in nature, and subsumes issues at which the parties are in dispute. It is clear, therefore, that any point of dispute between the parties which has to be answered by the arbitral tribunal can be the subject

[2] **(2018) 2 SCC 534**

> matter of an interim arbitral award. However, it is important to add a note of caution. In an appropriate case, the issue of more than one award may be necessitated on the facts of that case. However, by dealing with the matter in a piecemeal fashion, what must be borne in mind is that the resolution of the dispute as a whole will be delayed and parties will be put to additional expense. The arbitral tribunal should, therefore, consider whether there is any real advantage in delivering interim awards or in proceeding with the matter as a whole and delivering one final award, bearing in mind the avoidance of delay and additional expense. Ultimately, a fair means for resolution of all disputes should be uppermost in the mind of the arbitral tribunal.

12. In my view, the import of the afore-extracted passages from the judgment of the Supreme Court in ***IFFCO***[2] is clear and categorical. Any matter, on which an Arbitral Tribunal may make a final award, can also be subject of an interim award made by it. If, therefore, the decision of the Arbitral Tribunal brings a quietus to an issue before the Arbitral Tribunal, and is an order which the Arbitral Tribunal is empowered to pass at the final stage, it would constitute an "interim award" within the meaning of Section 31(6) and, consequently, within the meaning of Section 34 of the 1996 Act.

13. The impugned order dated 26th August 2020, of the learned Arbitral Tribunal has effectively rejected the counterclaims filed by the petitioner by stating that it "refused to entertain" the said claims. The reason for such rejection is, as is apparent from the impugned paragraph from the order dated 26th August, 2020, that the claims were not maintainable in view of the limited liberty granted by the learned Arbitral Tribunal vide its earlier order dated 24th September, 2019. A decision that the counter-claim is not maintainable and is, therefore,

liable to be rejected, is a decision which an Arbitral Tribunal can certainly take at the final stage of the proceedings, especially in view of the power conferred on the Arbitral Tribunal, by Section 16 of the 1996 Act, to rule on its own jurisdiction especially in view of the power conferred on the Arbitral Tribunal by Section 16 of the 1996 Act, to rule on its own jurisdiction. Being, therefore, in the nature of a decision which could be taken at the final stage of the proceedings, i.e. in the final award which the Arbitral Tribunal would pass, such a decision, when taken at an interlocutory stage, would, in my view, certainly constitute an "interim award" within the meaning of the 1996 Act, in view of the law laid down in ***IFFCO***[2].

14. Mr. Sandeep Bajaj, learned counsel for the respondent has placed reliance on a recent judgment of a learned Single Judge of the High Court of Calcutta in ***Lindsay International Pvt Ltd v. IFGL Refectories Ltd***[3]. The High Court of Calcutta, in that case, was concerned with a challenge to a decision, by the Arbitrator, to reject an application, by the petitioner (before the High Court) for amendment of its counter-statement before the learned Arbitral Tribunal seeking introduction of counter-claims. The rejection of the counter-claims was on the ground that they were barred by limitation. This, it was sought to be contended, effectively amounted to an adjudication of the counter-claims, bringing an end to the *lis* between the parties in that regard and, therefore, was in the nature of an "interim award". It was also contended that the counter-claims were not, in fact, barred by time and, in that regard, Section 23(3) of the 1996 Act was pressed

[3]**MANU/WB/0427/2021**

into service.

15. It is seen, from the aforesaid decision of the High Court of Calcutta, that the High Court has not alluded to the authority of the Arbitral Tribunal, in exercise of its jurisdiction under Section 16 of the 1996 Act, to rule on its own jurisdiction, which would include the power to reject a claim or counter-claim as being beyond the scope ofthe reference made before it. Viewed thus, any decision to the said effect, taken at the interim stage, would, in my view, constitute an"interim award" and would, therefore, be amenable to challenge under Section 34.

16. I respectfully regret my inability to subscribe to the view, expressed by the Calcutta High Court, that a decision of the Arbitral Tribunal to reject counter-claims as beyond the scope of reference is not an "interim award" amenable to challenge under Section 34 of the 1996 Act.

Conclusion

17. Accordingly, the impugned decision of the learned Arbitral Tribunal, whereby it has declined to entertain the counter claims of the NHAI, as preferred by its application dated 4th February, 2020, save and except the counterclaim for ₹12.2 crores, cannot sustain in law. It is, accordingly, quashed and set aside.

18. The petition is, accordingly, allowed with consequential relief

to NHAI with no order as to costs. All pending applications also stand disposed of.

C.HARI SHANKAR, J

FEBRUARY 28, 2022
r.bararia