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

Reserved on: 02.05.2023
Pronounced on: 28.06.2023

\+ **FAO(OS) (COMM) 88/2022 & CM APPL.19361/2022**

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

Through: Mr. Sanjay Poddar, Sr. Advocate with Mr. Sandeep Bajaj, Mr. Soayib Qureshi and Mr. Devansh Jain, Advocates.

versus

NATIONAL HIGHWAYS AUTHORITY OF INDIA ..... Respondent

Through: Mr. Narender Hooda, Sr. Advocate with Ms. Neetica Sharma, Ms. Shrinkhla Tiwari and Ms. Akshada Mujwar. Advocates.

CORAM:
HON'BLE MR. JUSTICE NAJMI WAZIRI
HON'BLE DR. JUSTICE SUDHIR KUMAR JAIN

J U D G M E N T

NAJMI WAZIRI, J.

1. This appeal under section 37 of the Arbitration and Conciliation Act, 1996 ('the Act') impugns the order dated 28.02.2022 passed by the learned Single Judge in a section 34 petition [O.M.P. (Comm.) No. 224 of 2021 titled *National Highways Authority of India vs. M/s Abhijeet Angul Sambalpur Toll Road Limited*.] The impugned order has set aside the order of the Arbitral Tribunal dated 26.08.2020. By majority decision the Arbitral Tribunal had declined to entertain two of the three counter-claims filed by the NHAI on the ground that

except for the counter-claim for Rs.12.2 crores, the other two had been "filed without authority". It concluded that it "shall not entertain to adjudicate the other counter-claims". The Arbitral Tribunal then proceeded to consider only the counter-claim of Rs.12.2 crores. The impugned order of the learned Single Judge has held that the right to file a counter-claim exists independent of any liberty granted by the Arbitral Tribunal and it was always open to the Arbitral Tribunal, in exercise of the powers conferred by it under section 16 of the Act, 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 the Arbitral Tribunal. The appellant had objected to the maintainability of NHAI's section 34 petition on the ground that the order of the Arbitral Tribunal was not an interim Award. The impugned order held as under:-

> *" 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.*
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> *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…."*

2. The impugned order has further reasoned as under:

> *"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 (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,*** *while noticing that the 1996 Act does not define "interim award", proceeded to opine as under:*
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> > *"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 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 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.

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****. 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 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 of the 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...”

3. Mr. Sanjay Poddar, the learned Senior Advocate for the appellant submits that the procedure prescribed in the Act is

designed for speedy adjudication of disputes through the alternative disputes resolution mechanism. The six months time frame stipulated for completion of pleadings in section 23(4) of the Act is to be strictly adhered to. He submits that *albeit* time was given to the respondent/NHAI to file their statement of defence and counter claim way back in 2015, they chose not to do so till 2019. The Tribunal had permitted NHAI to file a counter claim of only Rs.12.2 crores. NHAI filed no application under section 23 of the Act or under any provision of law except for a statement of defence. No claim was made by the respondent at the time of the termination of the contract and prior to the initiation of the arbitral proceedings. In the statement of defence also, no claim was made except for a statement saying that NHAI "reserved the right to present such counter claims as may be found appropriate before this learned Tribunal in due course".

4. He further submits that even this self-serving reservation of right shows that: i) NHAI was unsure as to whether it had a counter claim at all, ii) arbitral proceedings are not run on the whim and fancy of the parties, the schedule for completion of pleadings as fixed by the arbitral Tribunal is to be strictly adhered to, in view of the underlying need for expeditious disposal of claims, iii) NHAI did not adhere to the timeline fixed, iv) therefore, the Tribunal had rightly declined to entertain counter claims 2 and 3, which were beyond the scope of the claim, as initially envisaged and for which the arbitral

proceedings had been initiated by the appellant/claimant. In particular, the learned Senior Advocate refers to para 2 of the Tribunal's order, which has discussed the context in which the proceedings were pending before it. It reads *inter alia* as under:

> *"...2. The Claimant filed an application before Hon'ble High Court of Delhi seeking stay on encashment of the bank guarantee (bid security) of Rs.12.2 crores available with the Respondent. The Hon'ble High Court stayed the invocation of bank guarantee till final orders. The High Court decided on 22.8.2013 to get the money deposited in the court. On the money being deposited with the Registry of the Court, the Registry will invest the same in an interest bearing fixed deposit. The final orders of the Hon'ble High Court were passed on 16.09.2013 subject to the conditions: (i) The Concessionaire would keep the bank guarantee alive during the pendency of the Petition and to invoke arbitration within 10 days. (ii) The captioned petition will be placed before the Arbitrator who will treat the same as an application u/s 17 of the Act and decide the same in accordance with law. (iii) Both parties are free to prefer their claim and counter claims if any. (iv) The money deposited in the court will abide by the order of the Arbitrator (v) The arbitrator will be at liberty to pass an appropriate order in accordance with qua the application u/s 17 of the Act (vi) In case the Respondent is aggrieved by any acts of commission or omission of the Petitioner and in that behalf seeks to exercise its right under the agreement, the Respondent will be free to do so..."*

5. The appellant contends that the Tribunal's order pertains to procedure and is not an adjudication on the merits of the claim, therefore, it cannot be termed as an award or an interim award. It does

not adjudicate conclusively upon the substance of the new counter-claim raised by the respondent. Therefore, the impugned order has erred in treating the observation of the Tribunal as an interim award.

6. Refuting the appellant's contentions, the learned Senior Advocate for the respondent submits that pursuant to the decision in the section 34 proceedings, the Arbitral Tribunal has since proceeded with all the counter claims agitated by the respondent; evidence has already been recorded during the pendency of this appeal, therefore, no prejudice would be caused to the respondent as the Arbitral Tribunal is yet to take a final view apropos the substance or merit of the counter claims 2 and 3. He refers to the judgement of this court dated 29.03.2023 titled as *Goyal MG Gases Pvt Ltd vs. Panama Infrastructure Developers Pvt Ltd & Ors*. SCC OnLine Del 1894, which held that an award is to be distinguished from procedural directions and orders. The latter merely assist in the forward movement of the arbitral proceedings. It has held, *inter alia*, as under:-

> *"9. This court with regard to that apropros, whether rejection of an application for impleadment of parties constitute an interim award, this court has, in* ***Rhiti Sports V Powerplay Sports,*** *2018 SCC OnLine Del 8678, observed as under:-*
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> > *"16. A plain reading of Section 32 of the Act indicates the fact that the final award would embody the terms of the final settlement of disputes (either by adjudication process or otherwise) and would be a final culmination of the disputes referred to arbitration. Section 31(6) of the Act expressly provides that an Arbitral Tribunal may make an interim arbitral award in*

any matter in respect of which it may make a final award. Thus, plainly, before an order or a decision can be termed as "interim award", it is necessary that it qualifies the condition as specified under Section 31(6) of the Act: that is, it is in respect of which the arbitral tribunal may make an arbitral award.

17. As indicated above, a final award would necessarily entail of (i) all disputes in case no other award has been rendered earlier in respect of any of the disputes referred to the arbitral tribunal, or (ii) all the remaining disputes in case a partial or interim award(s) have been entered prior to entering the final award. In either event, the final award would necessarily (either through adjudication or otherwise) entail the settlement of the dispute at which the parties are at issue. It, thus, necessarily follows that for an order to qualify as an arbitral award either as final or interim, it must settle a matter at which the parties are at issue. Further, it would require to be in the form as specified under Section 31 of the Act.

18. To put it in the negative, any procedural order or an order that does not finally settle a matter at which the parties are at issue, would not qualify to be termed as "arbitral award".

19. In an arbitral proceeding, there may be several procedural orders that may be passed by an arbitral tribunal. Such orders may include a decision on whether to hold oral hearings for the presentation of evidence or for oral argument, or whether the arbitral proceedings are to be conducted on the basis of documents and other materials as required to be decided-unless otherwise agreed between the parties - in terms of

Section 24(1) of the Act. There are also other matters that the arbitral tribunal may require to determine such as time period for filing statement of claims, statement of defence, counter claims, appointment of an expert witness etc. The arbitral tribunal may also be required to address any of the procedural objections that may be raised by any party from time to time. However, none of those orders would qualify to be termed as an arbitral award since the same do not decide any matter at which the parties are at issue in respect of the disputes referred to the arbitral tribunal.

20. At this stage, it may be also relevant to refer to certain authoritative texts as to what would constitute an award. In Russell on Arbitration (Twenty-Third Edition), the author explains as under:-

> *"No statutory definition. There is no statutory definition of an award of English arbitration law despite the important consequences which flow from an award being made. In principle an award is a final determination of a particular issue or claim in the arbitration. It may be contrasted with orders and directions which address the procedural mechanisms to be adopted in the reference. Such procedural orders and directions are not necessarily final in that the tribunal may choose to vary or rescind them altogether. Thus, questions concerning the jurisdiction of the tribunal or the choice of the applicable substantive law are suitable for determination by the issue of an award. Questions concerning the timetable for the reference or the extent of disclosure of*

documents are procedural in nature and are determined by the issue of an order or direction and not by an award. The distinction is important because an award can be the subject of a challenge or an appeal to the court, whereas an order or direction in itself cannot be so challenged. A preliminary decision, for example of the engineer or adjudicator under a construction contract which is itself subject to review by an arbitration tribunal, is not an award."

21. In Mustill & Boyd on Commercial Arbitration (Second Edition), the author suggests two characteristics, which could be accepted as indicia of an award. The relevant extract of the aforesaid text reads as under:-

"....we do suggest two characteristics which we believe would be accepted as indicia of an award by the arbitrating community at large:

1. An award is the discharge, either in whole or in part, of the mandate entrusted to the tribunal by the parties; namely to decide the dispute which the parties have referred to them. That is, the award is concerned to resolve the substance of the dispute. Important aspects of the arbitrators duties are naturally concerned with the processes which lead up to the making of the awards, and they are empowered to arrive at decisions which enable those processes to be performed. The exercise of these powers are, however, antecedent to the performance of the

mandate, not part of the ultimate performance itself. Thus, procedural decisions, and the documents in which they may be embodied are not "awards".

2. Constituting as it does the discharge of the arbitrators mandate the award has two effects:
(a) Since the parties have, by their agreement to arbitrate, promised to be bound by the arbitrator" decision of their dispute, they are for all purposes bound by it between themselves, although others are not so bound. That is, the dispute becomes res judicata, with all that the concept implies for the purposes of English law as regards issues explicitly or implicitly decided as intermediate steps on the way to the final decision, issues which could have been raised, the effect on parties with derivative interests, and so on. (b) Since the making of the award constitutes a complete performance of the mandate entrusted to the arbitrators, it leaves them with no powers left to exercise: except of course, in the case of a partial award, when the exhaustion of the arbitrator" powers is complete as to part and incomplete as to the remainder."

22. In Centrotrade Minerals and Metal Inc. v. Hindustan Copper Ltd., (2017) 2 SCC 228, the Supreme Court had, inter alia, referred to the passages from Comparative International Commercial Arbitration Kluwer Law International, 2003 and Redfern and Hunter on International Arbitration (sixth edition) and observed as under:—

"9….The distinction between an award and a decision of an Arbitral Tribunal is summarized in Para 24-13 [Chapter 24: Arbitration Award in Julian D.M. Lew, Loukas A. Mistelis, et al., Comparative international Commercial arbitration]. It is observed that an award:

(i) concludes the dispute as to the specific issue determined in the award so that it has res judicata effect between the parties; if it is a final award, it terminates the tribunal's jurisdiction;

(ii) disposes of parties' respective claims;

(iii) may be confirmed by recognition and enforcement;

(iv) may be challenged in the courts of the place of arbitration

10. In International Arbitration [Chapter 9. Award in Nigel Blackaby, Constantine Part asides, et al., Redfern and Hunter on International Arbitration (Sixth Edition), 6 edition: Kluwer Law International, Oxford University Press 2015 pp. 501-568] a similar distinction is drawn between an award and decisions such as procedural orders and directions. It is observed that an award has finality attached to a decision on a substantive issue. Paragraph 9.08 in this context reads as follows:

"9.08 The term "award" should generally be reserved for decisions that finally determine the substantive issues with which they deal. This involves distinguishing between awards, which are concerned with substantive issues, and procedural orders and directions, which

are concerned with the conduct of the arbitration. Procedural orders and directions help to move the arbitration forward; they deal with such matters as the exchange of written evidence, the production of documents, and the arrangements for the conduct of the hearing. They do not have the status of awards and they may perhaps be called into question after the final award has been made (for example as evidence of "bias", or "lack of due process")."

23. The question whether in the given circumstances, a determination by an arbitral tribunal is an award has come up before courts in several matters. In ShyamTelecom Ltd. v. Icomm Ltd., 2010 (116) DRJ 456, this Court considered the challenge laid to an order of the arbitral tribunal dismissing an amendment application filed by the petitioner. In this context, the Court observed as under:-

"Clearly an interim Award has to be on a matter with respect to which a final Award can be made i.e. the interim Award is also the subject matter of a final Award. Putting it differently therefore an interim Award has to take the colour of a final Award. An interim Award is a final Award at the interim stage viz a stage earlier than at the stage of final arguments. It is a part final Award because there would remain pending other points and reliefs for adjudication. It is therefore, that I feel that an interim Award has to be in the nature of a part judgment and decree as envisaged under Section 2 (2) of CPC and the same

must be such that it conclusively determines the rights of the parties on a matter in controversy in the suit as done in a final judgment. An interim order thus cannot be said to be an interim Award when the order is not in the nature of a part decree. In my opinion the impugned order in view of what I have said hereinabove, is not an interim Award as it is not in the nature of a part decree being only an interim order."

24. In Sahyadri Earthmovers v. L&T Finance Limited, 2011 (6) BomCR 393, the Bombay High Court considered an application filed whereby the petitioner had, inter alia, prayed for directions to be issued to the arbitral tribunal to "formulate and prescribe the appropriate legal procedure for adjudicating the arbitration proceedings and convening the arbitration meetings and more particularly to record the evidence as per the Indian Evidence Act". The said application was moved under Section 9 read with Section 19 of the Act, but was occasioned by an order passed by the arbitral tribunal on an application filed by the petitioner for determining the arbitral procedure. In the aforesaid context, the Court observed as under:

"3. The first and foremost thing is that section 9 or section 19 or any other section under the Arbitration Act, nowhere permit a party to challenge such order passed by the Arbitrator pending the arbitration proceedings. It is neither final award and/or interim award. Therefore, there is no question of invoking even Section 34 of the Arbitration Act. The Arbitration Act

permits or provides the power of Court to entertain or interfere with the order passed by the Arbitrator, only if it is prescribed and not otherwise. Section 5 of the Arbitration Act is very clear which is reproduced as under."

25. In the present case, the impugned order relates to rejection of the petitioner's application to file additional documents. Clearly, this is a procedural matter and does not decide any issue for adjudicating the dispute between the parties. Thus, the contention that the same would qualify as an interim award is wholly unmerited.

30. There are several types of orders against which a remedy is specifically provided under the Act. In case of a challenge to the jurisdiction of an arbitral tribunal, the decision rejecting such challenge is not immediately amenable to judicial review and the party raising such challenge has to necessarily await the final award to pursue the said challenge, albeit against the arbitral award. However, an order accepting the said challenge is appealable under Section 37(2) of the Act. Similarly, a decision of the arbitral tribunal rejecting the challenge under Section 12(1) of the Act cannot be immediately assailed and the party challenging the arbitrator(s) has to necessarily follow the discipline of Section 13 of the Act. If such challenge is rejected, the arbitral tribunal is required to continue with the proceedings and make an arbitral award. The party raising the challenge to the appointment of an arbitrator would, subject to provision of Section 34(2) of the Act, be at liberty to challenge the arbitral award...."

7. The respondent further refers to the dicta of the Supreme Court in *National Highway Authority of India vs. Transstroy (India) Limited*, 2022 SCC OnLine SC 832, which held that: i) a delay of two days in filing a counter claim could not be a ground for rejecting it, ii) the rejection of the counter-claim of NHAI was unjustified since it was rejected on the ground that the procedure prescribed under Clause 26 of the Contract between the parties has not been followed, iii) a pragmatic approach is to be adopted towards filing of counter claims and the delay of two days in filing of the same should not come in the way of the counter-claim being entertained especially because the counter-claim arose from the same Contract and cause of action. It has held, *inter-alia*, as under:

> *"48. However, thereafter, when the NHAI filed the application under sub-section (2A) of Section 23 of the Arbitration Act, 1996 seeking to place on record its counter claim, by order dated 15.09.2017, the Arbitral Tribunal rejected the said application by observing that in the application for permitting the NHAI to place on record the counter claim, the NHAI has not stated anything about having made an attempt for such amicable settlement. However, it is required to be noted that from the very beginning, the NHAI reserved its right to claim the damages and even in the Statement of Defence also claimed such a set off of Rs. 1.23 crores and also specifically stated therein that the NHAI reserved its right to file the counter claim. Therefore, on the grounds on which the Arbitral Tribunal had rejected the application of NHAI to place on record the counter claim can be said to be contrary to the intent between the parties to resolve the dispute (which was for termination of the*

Contract by the NHAI) through conciliation first. In the facts and circumstances of the case, by such a narrow interpretation, the Arbitral Tribunal has taken away the valuable right of the NHAI to submit counter claim, which is of a very huge amount thereby negotiating the statutory and contractual rights of the NHAI and paving way for a piecemeal and inchoate adjudication.

49. When there is a provision for filing the counter claim - set off, which is expressly inserted in Section 23 of the Arbitration Act, 1996, there is no reason for curtailing the right of the appellant for making the counter claim or set off. If we do not allow the counter claim made by the NHAI in the proceedings arising out of the claims made by the Contractor, it may lead to parallel proceedings before various fora. While passing the impugned judgment and order, the High Court has lost sight of the aforesaid aspect, which ought to have been considered while considering the request on behalf of the NHAI to place on record its counter claim. Clauses 26.1 and 26.2 have to be interpreted in a pragmatic and practical manner, as they require that the parties must at first try to settle, resolve and even try conciliation but when the procedure under Clauses 26.1 and 26.2 fails to yield desired result, in the form of settlement within the period specified in Clause 26.2, the Dispute can be resolved through arbitration in terms of Clause 26.3. Once any dispute, difference or controversy is notified under Clause 26.1, the entire subject matter including counter claim/set off would form subject matter of arbitration as "any dispute which is not resolved in Clauses 26.1 and 26.2".

50. At this stage, it is required to be noted that as such there was no delay at all on the part of the NHAI initially praying for extension of time to file the

> *counter claim and/or thereafter to file application under Section 23(2A) permitting it to place on record the counter claim. In the facts and circumstances of the case, we are of the opinion that not permitting the NHAI to file the counter claim would defeat the object and purpose of permitting to file the counter claim/set off as provided under Section 23(2A) of the Arbitration Act, 1996. Without appreciating the aforesaid aspects, the High Court has by the impugned judgment and order, and on narrow interpretation of Clause 26 has seriously erred in rejecting the application under Section 34/37 of the Arbitration Act, 1996 and confirming the order passed by the Arbitral Tribunal in not permitting the NHAI to file the counter claim. The High Court ought to have appreciated that permitting the NHAI to file the counter claim may avoid multiplicity of proceedings.*
> *...”*

8. The essence of the aforesaid judgment is that: i) the valuable right of a party in filing of a counter-claim should not be taken away lightly and ii) insofar as section 23 of the Act provides for filing of counter-claim, there is no reason for curtailing the right of the respondent to make counter-claim(s).

Discussion and Conclusion:

9. The facts of the present case are rather different. In *NHAI vs. Tansstory (India) Limited* (*supra*), the Court's observation was in the context of merely two days' delay in filing of the counter-claim, which the Supreme Court deemed as no delay at all. In the present case, however, the right to file the counter-claim was limited till 31.05.2015. No counter-claim was filed by the respondent within that time. By the impugned order, the Arbitral Tribunal had permitted the NHAI to file a counter-claim of Rs.12.2 crores, since this was the only

claim sought by them in their section 17 application dated 04.02.2019. The additional two counter-claims have fundamentally altered the scope and magnitude of the counter-claim and indeed of the arbitral proceedings itself, to Rs.1282 crores; these additional two claims were slipped-in, as it were, alongwith the permitted counter-claim of Rs.12.2 crores. There is nothing on record to show what prevented the NHAI from seeking permission of the Arbitral Tribunal under section 23, to enlarge its counter-claim to Rs.1282 crores. There has been no determination yet on the substantive individual merit of the claim and counter-claims of the parties. The decision of the Arbitral Tribunal to not entertain the two counter-claims for the larger amount, is at best is a procedural order and cannot be termed as an 'Interim Award'.

10. The arbitral proceedings initiated in 2015 were for a far lesser amount. The appellant says that it wants an expeditious disposal of its claim alongwith determination of NHAI's counter-claim of Rs.12.2 crores, which has been permitted by the Arbitral Tribunal to be filed. Regarding this aspect, the proceedings are said to be at the stage of final arguments. There can be no disagreement with the contention that the objective of the Act is that arbitral disputes be disposed-off expeditiously.

11. On 12.02.2015, at the first hearing of the Arbitral Tribunal, the respondents were directed to file their reply if any, along with all the exhibits and counter-claims, to the statement of claim, so as to reach the Arbitral Tribunal and the other party on or before 31.05.2015. No counter claim was filed. The matter proceeded, evidence was led and

the parties were heard. The appellant/claimant had concluded its arguments on 23.09.2017, even the respondent/NHAI had concluded arguments apropos claim no.6 on 16.11.2018. On 24.09.2019 while rejecting NHAI's application under section 17 for release of Bank Guarantee, the Arbitral Tribunal permitted NHAI to file a counterclaim for an amount of Rs. 12.2 crores. On 23.10.2019, while filing the said counterclaim, the NHAI sought to file two additional counterclaims for an amount of Rs.1,282 crores. By a majority decision of two learned Arbitrators, the Tribunal held that "the same were filed without any authority". Its decision reads, *inter-alia*, as under:-

> *"6.1.7 It is seen that the AT had allowed the Respondent to file a Counter Claim for the amount of Rs. 12.2 Crores only, as claimed through their application dated 4.02.2020.*
>
> *However, the respondents have filed three 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 will adjudicate only one Counter-Claim for Rs.12.2 Crores, as per liberty allowed to the Responding for ,filing the particular Counter claim .*
>
> *The AT shall- not entertain to adjudicate other counter claims"*

12. The impugned section 34 order has held the said observation to be an interim award. The sole issue to be determined in this case is

whether the observation of the Arbitral Tribunal to the effect that the counter-claims filed by the respondent "without any authority" and it "shall not entertain to adjudicate the other counter-claims". would be deemed to be an interim award. Evidently, it is not yet a rejection of the claim which was the case in *National Highway Authority of India vs. Transstroy (India) Limited (supra),* where the claim was not entertained as it was deemed to be beyond the jurisdiction of the Arbitral Tribunal, the Supreme Court has permitted NHAI to file its counterclaim in order to avoid multiplicity of proceedings. An application for filing the counter-claim would have to be made in the manner prescribed under section 23 of the Act, which reads as under:

> *"23. Statement of claim and defence.—*
>
> *(1) Within the period of time agreed upon by the parties or determined by the arbitral tribunal, the claimant shall state the facts supporting his claim, the points at issue and the relief or remedy sought, and the respondent shall state his defence in respect of these particulars, unless the parties have otherwise agreed as to the required elements of those statements.*
>
> *(2) The parties may submit with their statements all documents they consider to be relevant or may add a reference to the documents or other evidence they will submit.*
>
> *(3) Unless otherwise agreed by the parties, either party may amend or supplement his claim or defence during the course of the arbitral proceedings, unless the arbitral tribunal considers it inappropriate to allow the amendment or supplement having regard to the delay in making it.*

> [1]*(4) The statement of claim and defence under this section shall be completed within a period of six months from the date the arbitrator or all the arbitrators, as the case may be, received notice, in writing of their appointment."*

13. In the present case, no such application had been filed by the NHAI. However, it would always be open to NHAI to do so. For the Tribunal to restrict itself to adjudicate on the counterclaims to only Rs.12.2 crores, in terms of NHAI's application dated 04.02.2019 was possibly keeping in mind, the fact that the proceedings which had reached an advanced stage, should not be opened all over again so as to make it an unending exercise, especially since the exercise apropos the claims and arbitral proceedings which had been pending since 12.02.2015.

14. What emerges from the preceding discussion is that of the three counterclaims filed by NHAI, two "were filed without any authority". Evidently the Tribunal's order does not determine counter-claims 2 and 3 on their individual merits nor does it adjudicate upon them in a manner that its order becomes a money decree nor does it conclude or determine the specific issues raised in the counterclaims so that the order becomes *res judicata* between the parties or terminates the Tribunal's jurisdiction apropos the said counterclaims, nor could it be construed that the order of the Tribunal has effectively rejected the counterclaims, only because it has refused to entertain them. The order does not dispose-off the parties' respective claims. Two of three

[1] Ins. by Act 33 of 2019, s. 5 (w.e.f. 30-8-2019).

NHAI's counter-claims have simply been kept aside, unexamined and unadjudicated. In the process however, their merit as may be, has not dissipated. The same remain intact till their admissibility and intrinsic merit is determined. The respondent NHAI cannot be rendered remediless. It was and would always be open to NHAI to rectify the position by seeking "authority" or permission on an application under section 23 of the Act.

15. In view of the above, we are unable to agree with the impugned order dated 28.02.2022, insofar as it holds that, in the facts of this case, the refusal of the Arbitral Tribunal, to entertain the counterclaims has resulted in an interim award. To that extent the impugned order is set-aside. However, as noted hereinabove, NHAI cannot be remediless and it would always be open to it to move appropriate application(s) before the Arbitral Tribunal for taking on record their two counterclaims and/or to pursue such remedies as may be available in law.

16. The appeal stands disposed-off in terms of the above.

NAJMI WAZIRI, J

DR.SUDHIR KUMAR JAIN, J

JUNE 28, 2023/*sb*