IN THE HIGH COURT AT CALCUTTA
Ordinary Original Civil Jurisdiction
ORIGINAL SIDE

Present :-

THE HON'BLE JUSTICE MOUSHUMI BHATTACHARYA

I.A No: G.A. 1 Of 2021

in

A.P. 33 Of 2021

Lindsay International Private Limited

Vs.

IFGL Refractories Limited

For the Petitioner	:	Mr. S.K. Kapur, Sr. Adv.
		Mr. S.N. Mookherjee, Sr. Adv.
		Mr. Rudraman Bhattacharya, Adv.
		Mr. S.R. Kakrania, Adv.
		Ms. Priyanka Prasad, Adv.
		Mr. Tanuj Kakrania, Adv.
		Mr. Aviroop Mitra, Adv.
		Mr. Sanjeeb Seni, Adv.
For the Respondent	:	Mr. Anindya Mitra, Sr. Adv.
		Mr. Jishnu Chowdhury, Adv.
		Mr. Soumabho Ghose, Adv.

WWW.LIVELAW.IN

Mr. Arunabha Deb, Adv.

Mr. Ayush Jain, Adv.

Mrs. Arti Bhattacharjee, Adv.

Reserved on : 16.06.2021.

Delivered on : 25.06.2021.

MOUshumi Bhattacharya, J.

1. This is an application for setting aside of, what the petitioner calls, an Interim Award dated 15th October, 2020 passed by a learned Sole Arbitrator. By the said award, the Arbitrator proceeded to reject the petitioner's application for amendment of the counter-statement seeking introduction of counter-claims/equitable set-off by the petitioner.

2. The petitioner has made out a case of the impugned order being an Interim Award on the ground that the Arbitrator finally decided the counter-claim/ set-off and held that the claims made therein were barred by limitation. The petitioner urges that in rejecting the claims, the Arbitrator put an end to the *lis* between the parties.

3. Mr. S.K. Kapur and Mr. S.N. Mookherjee, senior counsels appearing for the petitioner argue on the maintainability of the applications under Section 34 of The Arbitration and Conciliation Act, 1996 (the Act) and that

WWW.LIVELAW.IN

the impugned Interim Award dated 15th October, 2020 is amenable to challenge before this Court. Counsel relies on *Indian Farmers Fertilizer Cooperative Limited vs Bhadra Products; (2018) 2 SCC 534* and *LT. Col. H.S Bedi Retd. & Anr. vs STCI Finance Limited [OMP(Comm) 546 of 2020]*.

4. Counsel submits that the findings of the Arbitrator that the counter-claim/set-off was barred by limitation are contrary to and inconsistent with the Arbitrator's own findings in an application filed by the petitioner under Section 16 of the Act. It is also submitted that the Arbitrator did not take into account any evidence for arriving at the findings which are based on conjecture and surmise and are patently illegal and perverse. In this context, counsel relies on the specific findings of the Arbitrator in the Section 16 application filed by Lindsay together with the issues framed by the Arbitrator in relation to a Memorandum of Understanding (MOU) executed between IFGL Refractories Ltd. and Lindsay International Pvt. Ltd. on 28th October, 2016. It is submitted that in arriving at the impugned interim award, the Arbitrator disregarded the aforesaid issues which had been framed and there is no reference thereto in the impugned award. Counsel urges that the Arbitrator has ignored the amendments in the application filed by the petitioner under Section 23 of the Act and further that the Arbitrator accepted that the counter-claim and set-off were both within the scope of the reference since the arbitration is governed by the General Terms and Conditions and that the set-off and counter-claim falls squarely within the ambit of the arbitration. Counsel relies on *State of Goa*

WWW.LIVELAW.IN

vs Praveen Enterprises; (2012) 12 SCC 581 on the proposition that there can be no bar of limitation against the set-off/counter-claim pleaded in the amendment.

5. In relation to Section 23(3) of the Act, counsel submits that the aforesaid provision contains the procedural rules regarding amendment of the statement of claim/defence and that the discretion given to the Arbitrator in rejecting an amendment under Section 23(3) would only be subject to the delay in making it. Counsel submits that the Arbitrator in the present case has not considered this aspect of the matter and that the Arbitrator could not have adjudicated the question of limitation at the stage of the amendment application at all. Counsel submits that in any event there was no delay on the part of the petitioner in seeking amendments to the counter-claim and that the Arbitrator entered into the substantive question of the claim being barred by limitation.

6. Mr. Anindya Kr. Mitra, senior counsel appearing for the respondent takes a point of maintainability on the point that the order refusing incorporation of a new claim by way of amendment to the Statement of Defence is not an interim award. In this connection, counsel submits that the petitioner did not apply for an interim award under Section 31(6) of the Act but applied for incorporation of a new claim by way of amendment of the Statement of Defence under Section 23(3) of the Act. Counsel submits that the claim and decree sought to be incorporated in the Statement of Defence had not been referred to in the arbitration and further that the impugned

WWW.LIVELAW.IN

order which is under challenge has not been described as an Interim Award by the Arbitrator. Counsel relies on a Division Bench decision of this Court in *Ranjiv Kumar and Anr. vs Sanjiv Kumar and Anr.(APO No. 16 of 2018)* and *Indian Farmers* on the defining characteristic of an interim award. Counsel additionally submits that an order of the Arbitrator refusing amendment of pleadings for incorporation of a new claim which has not been referred to arbitration and which does not involve any decision on the claims already made would not be a matter in respect of which a final award can be made. Several decisions of the Supreme Court and the Bombay and Delhi High Courts have been relied upon in this context.

7. As an alternative argument, counsel urges that even if the order refusing amendment of the Statement of Defence for incorporating new claims is considered to be an Interim Award, the instant petition under Section 34 should be dismissed as no ground for interference has been made out by the petitioner. Counsel elaborates on this point by submitting that the impugned order was based on facts as averred in the petition for amendment and the proposed amendment would show that the counter-claim sought to be incorporated in the Statement of Defence was *ex facie* barred by limitation. Counsel further submits that no case for equitable set-off was made out by the petitioner and the arbitral tribunal did not have jurisdiction to adjudicate the counter-claim under Section 23(2A) of the 1996 Act. Counsel submits that the claim for damages made in the amendment is a new claim which was not referred to in the Statement of Defence nor in the issues framed. On the factual score, counsel submits

WWW.LIVELAW.IN

that the petitioner's case was that the MOU was breached by the respondent by cancellation on 5th December, 2016 whereas the application for amendment was submitted to arbitration on 23rd January, 2020 which was more than three years from the date of breach. It is additionally submitted that the breach of the MOU for which damages were claimed by the petitioner does not contain an Arbitration Clause, hence the jurisdiction of the arbitral tribunal to adjudicate the counter-claim / set-off arising out of the MOU was barred under Section 23 (2A) of the 1996 Act.

8. On Section 23(2A) of the Act, counsel contends that the petitioner had specifically argued before the Arbitrator that delay was not relevant for amendment of the Statement of Defence but has made contrary arguments before this Court. Counsel disputes the factual matters argued on behalf of the petitioner as being contrary to the case made out in the amendment application and submits that the amendment application was in any event not bona fide and was only made to delay the arbitration.

9. Counsel submits that the MOU is an independent contract and further that the counter-claim is outside the scope of the amendment application. It is further submitted that the arbitration is only confined to the twelve Purchase Orders and that the MOU dated 28th October, 2016 does not have an arbitration clause. Counsel relies on the judgment of a learned Single Judge in an application under Section 11 of the 1996 Act passed on 22nd January, 2019 which noted that the Purchase Orders

WWW.LIVELAW.IN

referred to the General Terms and Conditions containing an arbitration clause.

10. I have heard learned counsel appearing for the parties. For ease of reference and considering the points urged, the judgment is structured in the following manner :-

A. Maintainability of the application.

B. The relevance of section 23 (3) of The Arbitration and Conciliation Act, 1996.

C. If the application is found to be maintainable, whether the impugned award is amenable to challenge under section 34 of the Act.

A. Maintainability of the application :-

11. The position of the parties, in brief, is this; the petitioner Lindsay says that the impugned order of the Arbitrator rejecting the amendment to the Statement of Defence of Lindsay for incorporating a Counter-Claim is an "Interim Award" under the 1996 Act and would hence come within the purview of section 34 for setting aside of the said award.

12. The respondent IFGL – claimant in the arbitration- urges that the order under challenge is not an award/interim award and further that the tribunal lacked jurisdiction under section 23(2A) of the Act to adjudicate the

WWW.LIVELAW.IN

Counter Claim. According to IFGL, the petition under section 34 is not maintainable.

13. While an 'Award' has not received a specific definition in The Arbitration and Conciliation Act, 1996, despite forming the substratum of most of the provisions in the said Act, an 'Interim Award' shares space with and is subsumed within an 'Award' under section 2(c) of the Act. In section 31(6), an interim award is described as one which an Arbitrator has the option to give at any time during the course of the arbitral proceedings before making the final award. By definition, an interim award denotes a pronouncement in the interregnum, much like an interim order which settles a part of the claim by granting relief (or denying it) pending final hearing of the action filed in a court. Like any pronouncement which is intended to lend quietus to a part of the controversy, in consonance with the settled parameters for such, the interim decision must fall within the firm contours of the relief which can finally be granted by the tribunal. Simply put, an interim award cannot go beyond what the tribunal is empowered to grant by way of final relief on a complete consideration of the facts or upon trial. It is hence axiomatic that a decision which is intended as an interim measure, must be within the span and possibilities of the relief which can be granted by the Court/ Tribunal in the action filed.

14. Section 31(6) reinforces the above view in framing the jurisdiction of the arbitral tribunal to make an interim award, as:-

WWW.LIVELAW.IN

> *"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".*

thus 31(6) sets the boundaries of the matters within which the tribunal can make an award. The intent appears to be that an award must be a final decision on a claim or a matter which has been referred to arbitration. Similarly, an interim award is one which is on a matter in respect of which a final award can be made by the Arbitrator; refer: *Indian Farmers,* in which the Supreme Court, relying on *McDermott International vs Burn Standard; (2006) 11 SCC 181*, clarified that an interim award *"....may be a final award on the matters covered thereby, but made at an interim stage."* In *Ranjiv Kumar vs Sanjiv Kumar*, a Division Bench of this Court was of the view that '*any matter*' under section 31(6) covers only such matters which would close a part of the lis, while the Bombay High Court in *Harinarayan G. Bajaj vs Sharedeal Financial Consultants; 2003(2) Mh.L.J.598* opined that an interim award must be in respect of claims or counter claims which have been the subject of submission of reference to the arbitral tribunal.

15. The enquiry must then be; whether the order under challenge passes the test of an interim award capable of slipping in through a section 34 route or is simply an order which, despite the apparent prejudice caused to Lindsay, must be kept outside the recourse available in section 34 of the Act. The relevant pleadings in this context will be the Statement of Claim filed by IFGL, the Statement of Defence of Lindsay, the application for amendment to the Statement of Defence for incorporation of a Counter

WWW.LIVELAW.IN

Claim, the proposed Set-Off and Counter Claim of Lindsay and the order of the Arbitrator which is under challenge before this Court.

(i) Statement of Claim of IFGL :-

The claim of IFGL is for Rs 3,20,52,000 + interest on account of supply of refractory items by IFGL (Seller) to Lindsay in respect of 12 Purchase Orders(POs) and in terms of Lindsay's obligation to pay statutory dues under the Central Sales Tax Act.

The case of IFGL was based on 12 POs based on the General terms and Conditions for supply framed by Lindsay forming part of the contract between the parties which include an arbitration clause. The terms of the POs provided that Lindsay would pay IFGL within 3 days of receiving payment from the Arcelor Mittal companies. Lindsay however defaulted in its payment obligations to IFGL despite receiving the payments from the overseas buyers. The claim has been restricted to those POs against which payments were received by Lindsay. IFGL has referred to an admission on the part of the Chief Financial Officer of Lindsay in respect of receipt of Rs.4,21,70,432.21/- from the AM Companies/ overseas buyers to the account of IFGL. Of this amount, it is stated that Rs.207.88 lacs relates to the 12 POs while the balance amount relates to the supplies made by the earlier entity of the IFGL pre-merger, which is a part of a separate reference. IFGL further states that a new term introduced by Lindsay in the POs issued on and from 1st August 2016 to the effect that IFGL would not have any direct

WWW.LIVELAW.IN

contact with any Arcelor Mittal companies, is not relevant for the present proceeding since the POs in respect of which the claim has been made were issued prior to 1st August 2016.

IFGL has also referred to a Memorandum of Understanding (MOU) executed between the parties which contains an admission by Lindsay that it received 4.21 crores from the Arcelor Mittal companies which amount was due to IFGL group. According to IFGL, Lindsay did not act upon the MOU and repudiated the MOU by committing breach of its essential conditions by reason of which IFGL accepted the repudiation and formally cancelled the MOU on 5th December, 2016.

(ii) Statement of Defence of Lindsay

Lindsay's response to IFGL's SOC was that IFGL used to supply refractory goods on an exclusive basis to Lindsay which were, in turn, sold to the Arcelor Mittal (AM) Companies since 1999. According to Lindsay, IFGL could not make direct supplies to the AM Companies. The arbitration clause in the General Terms and Conditions cannot be relied upon as the arbitration agreement has not been signed by the parties. According to Lindsay, the purchase orders stood novated and superseded by a MOU. It is also stated that IFGL wrongfully and illegally terminated the MOU and that IFGL was in breach of the MOU. Lindsay has stated that there is arbitration agreement governing the parties and that IFGL hence could not have invoked any arbitration

WWW.LIVELAW.IN

clause. The remaining averments in the SOD are denials of statements made by IFGL in the SOC.

(iii) Application of Lindsay under sections 23 (2A) and 23(3) of the Act for amendment of the Statement of Defence and for incorporation of a Counter Claim

Lindsay filed this application for leave to amend the Statement of Defence and for leave to file a Counter Claim as a result of an omission to do so in the SOD filed on 20th September, 2019. The subject of the counter claim is the damages incurred by Lindsay owing to breach of the MOU. According to Lindsay, the tribunal has discretionary powers to allow the application filed under section 23(3) of the Act and there is no agreement to the contrary between the parties in respect of filing an application for amendment of pleadings.

(iv) Proposed Set-Off and Counter Claim of Lindsay

The case made out by Lindsay is that Lindsay has been purchasing refractories from IFGL since 1999 for selling to the Arcelor Mittal companies in terms of orders placed by the AM companies to Lindsay. There were express agreements that IFGL would not enter into any transaction directly with the AM companies without routing through Lindsay. This arrangement was with the knowledge and consent of the AM companies. However, after and from June 2016,

WWW.LIVELAW.IN

IFGL and the AM companies, in collusion and conspiracy with each other, disregarded the arrangement and began to directly deal/buy and sell between themselves. Lindsay discovered this in September 2016 and withheld certain payments claimed by IFGL. The parties entered into a MOU on 28th October, 2016 for settling all pending disputes by which the payment of Rs 4.21 crores for supplies made by IFGL would be kept in abeyance and a methodology for future payments would be worked out. IFGL however reneged on the MOU and unilaterally cancelled it on 5th December, 2016. Such repudiation was not accepted by Lindsay. The MOU does not contain any arbitration clause and is an independent agreement which extinguished all previous arrangements between the parties including POs and matters of payment.

Lindsay accordingly prayed for a declaration that the MOU was binding upon IFGL and IFGL committed breach of the said MOU. Lindsay also prayed for a decree for Rs.10 crores as damages against IFGL for such breach as well as damages for future supplies by IFGL to Lindsay.

(v) Impugned order of the Arbitrator rejecting the application of Lindsay

The Arbitrator rejected the application of Lindsay for amending the SOD. The order of the Arbitrator, which is under challenge in the present application filed by Lindsay, is premised on the following reasons;

WWW.LIVELAW.IN

a) Reliefs sought to be introduced by way of amendment are barred by limitation.

b) A party who has failed to seek recourse in relation to a contract which has been repudiated by the other party cannot be permitted to seek relief after expiry of the period of limitation.

c) The relief seeking declaration that the MOU was binding upon IFGL and IFGL committed breach of the said MOU was barred under Article 58 of The Limitation Act, 1963, as the causes of action for suing IFGL accrued on 5th December, 2016 and the application for amendment was filed by Lindsay on 23rd January, 2020.

d) The claim for damages is barred under Article 55 of The Limitation Act as the alleged breach of the MOU was committed by IFGL on 5th December, 2016 whereas the application for amendment was filed on 23rd January, 2020, since the starting point of limitation would be the date of the alleged breach and not the date of termination of the contract.

e) The pleadings in the amendment application do not disclose that Lindsay's claim for damages of Rs 10 crores arises out of the 12 transactions between the parties and forms the subject matter of the reference.

f) Lindsay's claim cannot be regarded as an equitable set off since the loss has not been quantified and the plea of set off does not

WWW.LIVELAW.IN

rest on mutual debits and credits/cross demands arising out of the same transaction.

g) The claim of an equitable set off is barred by limitation.

h) Filing of the suit by Lindsay within the period of limitation cannot save the period of limitation for identical reliefs in the arbitration.

i) IFGL's repudiation of the MOU, on which Lindsay's claim for damages is based, does not contain an arbitration clause.

j) IFGL will be compelled to participate in Lindsay's claim which is ex-facie barred by limitation if the prayer for amendment is allowed.

16. Before the Court draws the conclusions from the above discussion, the factual contentions urged on behalf of Lindsay, which have a bearing with the pleadings, are required to be dealt with.

17. According to counsel appearing for Lindsay, the Counter Claim is within the scope of the arbitration agreement. Second, the Arbitrator had held in an application filed by Lindsay under section 16 that the Arbitrator had negated the existence of the MOU and further that the disputes between the parties were settled by the MOU which does not have an arbitration clause. It has also been argued that the arbitration is not confined to the 12 POs and further that the POs do not contain the arbitration agreement governing the transactions between the parties.

WWW.LIVELAW.IN

18. The documents brought on record in the present proceeding would shed light on the correctness of these contentions. First, the argument of Lindsay that the Counter Claim is within the scope of the reference is belied by its amendment application, paragraph 4 of which states that the Counter Claim for damages incurred by Lindsay for breach of the MOU was omitted from the SOD as originally filed. Second, with regard to the finding of the Arbitrator on the MOU, the order passed by the Arbitrator on 24th August, 2019 in the section 16 application filed by Lindsay objecting to the competence of the tribunal, should be revisited. The issue therein was noted thus:

> "No doubt, it is admitted by the parties that the parties subsequently executed MOU. In this context a question has cropped up as to whether the arbitration agreement stood superseded by the subsequent MOU or not?"

19. After considering the clauses in the MOU and other factual matters, the Arbitrator disagreed with the contention of Lindsay that the MOU had altered/substituted the earlier contract between the parties. The Arbitrator held that the MOU does not provide that the arbitration agreement existing between the parties would stand superseded or that the parties would not be able to approach the arbitrator for resolution of their disputes. The argument of Lindsay is hence contrary to the finding of the Arbitrator. In any event, this argument does not appear to have been stated in the amendment application filed by Lindsay which culminated in the impugned order rejecting the said application. In this context, it should also be mentioned that in the application for amendment of the SOD, Lindsay has

WWW.LIVELAW.IN

made a specific statement that the MOU does not contain an arbitration clause. Third, the contention of Lindsay of the arbitration being beyond the 12 POs is not corroborated in the relevant documents. IFGL's Letter of Invocation of 9th December, 2016, clearly tabulated the claims under 12 POs which were being referred to arbitration. The judgment passed by a learned Single Judge of this Court on 22nd January, 2019 in an application filed by IFGL under section 11 of the Act for appointment of an arbitrator – AP 413 of 2017 – also mentions the dispute raised by the unpaid vendor (IFGL) in relation to 12 POs. The issue revolving around the 12 POs is reiterated several times in the decision.

20. The conclusions from the above can only be this; the arbitration is restricted to the 12 Purchase Orders issued by Lindsay to IFGL for supply of refractories and concerns payment for the goods supplied by IFGL to Lindsay. Further, the MOU dated 28th October 2016 was not part of the reference as would be evident from Lindsay's stand in the application – specifically in paragraph 4 thereof - for amendment of the Statement of Defence. The amendment by Lindsay sought to introduce an entirely new factual dispute, namely, Lindsay's claim for damages from IFGL's breach of the MOU and equitable set off in the event of a finding of liability against Lindsay. The arguments seek to impress upon this Court that the MOU was a crucial turning-point in the transactional arrangement between the parties and had been recognised as such by the Arbitrator at an earlier stage in the reference. The arguments made on behalf of Lindsay before this Court, in

WWW.LIVELAW.IN

respect of the MOU and in respect of the impugned order of the Arbitrator rejecting the amendment application of Lindsay, are not relevant for the question as to whether the order fulfils the criteria of an award / interim award.

21. These considerations cannot however divert the focus from the question fundamental to the enquiry; whether the challenge to the impugned order is maintainable as an action under section 34 of the Act for seeking recourse against an arbitral award. All that has to be seen for answering the question is whether the MOU or the consequences of breach thereto was part of the reference before the Arbitrator. It evidently was not. Section 31(6) sets out the contours of the powers of an arbitral tribunal in terms of making an interim arbitral award by making the powers fetters-free on when to pronounce and what to pronounce including the discretion whether to make an interim award at all or not, limited only to the 'matter' being conducive for making an award in the interregnum and within the scope of the reference. Any matter which is sought to be introduced to the existing corpus of the dispute, so to speak, lies outside the contours of the reference and hence beyond the contemplation of what would constitute an interim arbitral award.

22. Several decisions have considered a similar factual issue, namely, whether an order of the Arbitrator refusing amendment of pleadings for incorporation of new claims which were not referred to arbitration or involving a decision on the claims already referred, would be a matter in

WWW.LIVELAW.IN

respect of which a final award can be made. In *Container Corporation of India vs Texmaco Limited; 2009 SCC Online Del 1594*; the Delhi High Court was of the view that dismissal of an application for amendment of the written statement whereby the petitioner was not allowed to include the counter claim at a belated stage cannot be termed as an interim award. *Harinarayan vs. Sharedeal* considered a rejection of an application under section 27 of the Act *("Court assistance in taking evidence")* wherein the Bombay High Court held that in order to be an award, the decision must result in a final determination of the claim, part of the claim or counter claim submitted to arbitration. The issue in *Punj Lloyd Limited vs. Oil and Natural Gas Corporation Ltd.; 2016 SCC Online Bom 3749*; was whether refusal by the tribunal to permit amendment to one of the claims can be construed as an award/interim award. The Bombay High Court held that since the decision was made on an application under section 23 and there was no adjudication of the claim on merits, the decision could not be construed as an award under section 2(1)(c) of the Act. In *Cinevistaas Ltd. vs Prasar Bharti; 2019 SCC Online Del 7071*, the Delhi High Court considered whether the order of the Arbitrator rejecting the proposed amendments for incorporation of additional claims on the ground of limitation resulted in an interim award under the provisions of the 1996 Act. The Court held that the facts would point to an interim award since there was a final adjudication of the issues by the arbitrator.

23. The decisions shown on behalf of Lindsay can be distinguished on the factual score. In *Indian Farmers*, the issue before the Supreme Court was

WWW.LIVELAW.IN

whether an award passed by the arbitrator deciding an issue of limitation could be said to be an interim award. The arbitrator had decided the issue in favour of the claimant holding that the claims were not time-barred. It was on these facts that the Supreme Court opined that if a matter was finally disposed of by the arbitrator, it would amount to an interim award and hence amenable to challenge under section 34 of the Act. In *Lt Col H.S. Bedi vs STCI Limited*, the facts involved rejection of the amendment of the Statement of Defence by the arbitrator. The Delhi High Court, following *Cinevistaas*, held in favour of the decision being an interim order under section 31(6) of the Act. None of these decisions were concerned with an amendment to the Statement of Defence and incorporating counter claims that were not part of the reference.

24. In the present case, the rejection of Lindsay's application for amendment may have primarily been on the bar of limitation but was also on the fact that Lindsay's claim for damages of Rs 10 crores did not arise out of the 12 transactions which formed the subject matter of the reference. Shorn of any other consideration, the basic premise is that rejection of an attempt to introduce a new cause of action, which is not part of the subject matter of the reference, cannot amount to an interim award under section 31(6) of the Act. This is by reason of the fact that the decision (of rejection) of the matter (being a claim for damages arising out of the alleged breach of the MOU) was not a part of and had no causal or factual link to the claim arising out of the 12 POs. This Court is therefore of the view that the impugned order dated 15th October, 2020, is not an 'Interim Award' as

WWW.LIVELAW.IN

defined under sections 2(1)(c) and 31(6) of the 1996 Act and it hence follows that the present application is not maintainable under section 34 of the said Act.

B. Section 23 of The Arbitration and Conciliation Act, 1996 :-

25. Any discussion of amendment of pleadings in an arbitration must bring within its fold section 23 of the Act, a part of which is set out below;

> **23.** ***"****(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".*

Section 23(2A) and (3) are relevant for the purposes of the present application. 23 (2A) is set out below:

> **23**. *"(2A) The respondent, in support of his case, may also submit a coutner-claim or plead a set-off, which shall be adjudicated upon by the arbitral tribunal, if such counter-claim or set-off falls within the scope of the arbitration agreement."*

26. 23(2A), brought into effect in 2015, sets the boundaries of adjudication by the arbitral tribunal on a counter-claim or set-off by a respondent; that the cases made out must fall within the scope of the

WWW.LIVELAW.IN

arbitration agreement. By Lindsay's own showing, the MOU, the alleged breach of which by IFGL results in the claim for damages, does not contain an arbitration clause (at paragraph 29 of Lindsay's set-off and counter-claim). Hence, the statutory bar under 23(2A) in the matter of adjudication by the arbitral tribunal on the proposed amendments becomes operative.

27. The next aspect is the bar in permitting an amended/supplemented claim/defence on the ground of 'delay' under Section 23(3) which is set out:-

> *23. "(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.*
>
> *(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."*

Given the intended objective of the above sub-sections, the issues which would arise are (i) whether there was delay in the making of Lindsay's application and (ii) if yes, whether the rejection of the amendment by the Arbitrator was justified on that ground.

28. A few dates would be relevant for the assessment of the above points. The notice of appointment was received by the Arbitrator in January/February 2019 (IFGL has not produced any document bearing the exact date). The Arbitrator entered upon the reference on 14th February, 2019. The schedule of dates for filing of pleadings by the parties were fixed

WWW.LIVELAW.IN

in the hearing held on 19th March 2019 by which IFGL was to file the Statement of Claim on or before 9th April 2019 and Lindsay to file its Reply to the SOC and Counter – claim if any on or before 30th April 2019. IFGL filed the Statement of Claim within the scheduled date, i.e., 9th April, 2019. On 1st May 2019, Lindsay filed an application under section 16 of the Act. Fresh directions were issued by the tribunal on 20th June, 2019 requiring Lindsay to file the Statement of Defence by 11th July, 2019 (since the SOD had not been filed by 30th April, 2019 as directed by the tribunal on 19th March, 2019). On 10th July, 2019, Lindsay filed an application asking the tribunal not to insist upon filing the SOD till its application under section 16 is decided. Lindsay's application under section 16 was dismissed by the Arbitrator on 24th August, 2019. Lindsay filed the Statement of Defence on 20th September, 2019. IFGL filed the Rejoinder to the SOD on 30th September, 2019. Lindsay's application for amendment of the SOD and introduction of a counter-claim was filed on 23rd January, 2020. The application for amendment was dismissed by the Arbitrator on 15th October, 2020.

29. Section 23, like most other provisions of the 1996 Act, reinforces party-autonomy by giving full leeway to the parties to decide the timelines for submitting their statements of claim and defence. 23(2A) permits the respondent to file pleadings in addition to 23(1) and (2) within the scope of the arbitration agreement which has been discussed above in some detail. 23(3), while preserving the liberty given to the parties to amend or supplement the pleadings filed under 23(1) and (2A) empowers the arbitral

WWW.LIVELAW.IN

tribunal to draw the limit of that liberty if the tribunal thinks that there has been inordinate delay in the making of such amended pleading warranting its rejection.

30. The dates relevant to the matter should be weighed against the bar of 'delay' in 23(3), Lindsay filed its SOD on 20th September 2019 although it was required to file the SOD by 30th April 2019. The SOD filed on 20th September 2019 was not accompanied with a counter-claim, which was only filed on 23rd January 2020 together with an application for amendment of the SOD. There was hence admitted delay - 9 months - on the part of Lindsay. The Sole Arbitrator received notice of his appointment in or around January/February 2019. Hence the statements of claim and defence, together with amendments/supplements thereto, should have been completed by August 2019. The delay comes into sharper focus when pitted against section 23(4) of the Act which was inserted with effect from 30th August 2019 and mandates that :-

> *23. (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."*

31. The words used in section 23(3) in carving an exception out from the liberal principles concerning amendment of pleadings are *".... unless the tribunal considers it inappropriate to allow....having regard to the delay in making it".* A distinction may therefore be made where delay is the only ground mandated for rejection of the amendment and where (as 23(3)

WWW.LIVELAW.IN

presently stands) delay may be one but not the sole ground for disallowing an amendment. In this respect, reference may be made to *Shri Sitaram Sugar Company vs. Union of India (1990) 3 SCC 223*, where in paragraph 29 of the Report, a 5-member Bench of the Supreme Court drew a distinction between the expressions *"having regard to"* and *"having regard only to"* and held that the former is not a fetter but a general guidance to make an estimate. In the light of the explanation given by the Supreme Court, section 23(3) does not limit the Arbitrator from taking into account other factors for rejecting an amendment although delay remains the foremost among such considerations.

32. In the order impugned, the delay on the part of Lindsay in making the application for amendment under section 23 has been equated with its failure to enforce the contract or sue for damages within the prescribed period of limitation despite having rejected the repudiation of the contract by IFGL. The Arbitrator held that Lindsay's prayer in the amendment application, that the MOU dated 28th October 2016 was binding upon IFGL and that IFGL was in breach of the MOU, was barred under Article 58 of the Limitation Act as the cause of action for suing IFGL for the said relief first accrued on 5th December 2016 while the application was filed on 23rd January 2020. The Arbitrator also held that Lindsay's second prayer (in the amendment application) for a decree of Rs. 10 crores as damages for breach of the MOU by IFGL was also barred under Article 55 of the Limitation Act as the alleged breach in the form of repudiation of the MOU was on 5th December 2016.

WWW.LIVELAW.IN

33. Strictly speaking, the bar of limitation on which Lindsay's application for amendment was rejected is different from with the delay contemplated under section 23(3) and (4) of the 1996 Act. Under the 1996 Act, the delay is in relation to the making of the application for amendment of pleadings by a party during the course of the arbitral proceedings. The language of 23(3) must however be taken in an expansive context and not in a restrictive and narrow sense. While treating 'delay' as a ground for not allowing an application under 23(3), the words therein do not suggest that the tribunal would be precluded from considering the delay in the making of the application under the laws of limitation or confine itself only to the delay envisaged under section 23(4), which provides a time frame within which the pleadings have to be completed. Since there has admittedly been a delay on Lindsay's part with reference to the time frame provided under Section 23(4), this Court does not find any infirmity, in fact or in law, in the reasons given by the Arbitrator for arriving at the decision.

34. Although, counsel appearing for the Lindsay has invited this Court to engage with the other factual disputes between the parties and a compilation of documents has been filed in that regard, this Court is of the view that such other factual aspects are not relevant to be gone into at this stage. Counsel for Lindsay has referred to the findings of the Arbitrator in the application filed by Lindsay under Section 16 of the Act and the issues framed therein on the termination of the MOU by IFGL and the alleged breach thereof. Such questions would only be germane if this Court were to

WWW.LIVELAW.IN

go into the merits of the impugned order and test the correctness of the findings therein. Having found that the counter-claim of Lindsay was beyond the scope of the arbitration agreement and the arbitral tribunal could, therefore, not make an interim arbitral award based on the counter-claim, the impugned order dated 15th October, 2020 falls outside the purview of the recourse available for setting aside an arbitral award under Section 34 of the Act. Due regard has been given to the definition of an award under Sections 2(c) and 31(6) read with 23(2A) of the Act. The basis of this view has already been discussed above and is not being repeated.

33. The order impugned in this application not being an award is hence not amenable to challenge under Section 34 of the Act and A.P.33 of 2021 is accordingly dismissed without any order as to costs.

34. Prayer for stay is made on behalf of the respondent in this application. Considering the period since which the Arbitration Proceedings have been continuing, such prayer for stay is considered and refused.

34. IA GA 1 of 2021 filed by IFGL for dismissal of A.P No. 33 of 2021 and for stay of proceedings therein is disposed of in terms of this judgment.

Urgent Photostat certified copy of this Judgment, if applied for, be supplied to the parties upon compliance of all requisite formalities

(MOUSHUMI BHATTACHARYA, J.)