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

% **Order reserved on: December 06, 2022**
Order pronounced on: December 22, 2022

\+ O.M.P. (COMM) 477/2022, I.A. 20214/2022 (Stay), I.A. 20216/2022 (Extended List Of Dates & Events)

NATIONAL HIGHWAY AUTHORITY OF INDIA
..... Petitioner

Through: Mr. Ankur Mittal, Mr. Ravshal Kumar and Mr. Yash Kapoor, Advs.

versus

LUCKNOW SITAPUR EXPRESSWAY LTD ..... Respondent

Through: Mr. Sandeep Sethi, Sr. Adv. with Mr. Deepak Khurana, Mr. Ashwini Tak and Mr. Ankur Upadhyay, Advs.

CORAM:
HON'BLE MR. JUSTICE YASHWANT VARMA

O R D E R

1. This petition impugns an order dated 16 August 2022 passed by the Arbitral Tribunal rejecting an application made by the petitioner for impleadment of the State of Uttar Pradesh as a party in the ongoing arbitration proceedings. The petition terms the aforesaid order as being an "interim award" and purports to have been preferred under Section 34 of the **Arbitration and Conciliation Act, 1996**[1]. In order to appreciate the challenge which stands raised, it would be pertinent to notice the following essential facts.

[1] the Act

2. The dispute inter partes emanates from a **Concession Agreement**[2] dated 23 December 2005 executed between the petitioner, the **National Highways Authorities of India**[3] and the respondent and relates to a project for improvement, operation and maintenance, including strengthening and widening of an existing 2-Lane Road from KM 488.270 to KM 413.200 section of NH-24 and for its conversion into a 4 lane-dual carriageway. The aforenoted stretch falls within the territorial boundaries of the State of U.P. From the record it transpires that apart from the C.A. signed by the petitioner and the respondent here on 23 December 2005, a Tripartite Agreement came to be executed between the State of U.P., NHAI and the respondent on 29 November 2006. This shall be referred to in the latter parts of this decision as the **State Support Agreement**[4].

3. The record would reflect that pursuant to the reference of disputes to arbitration and with such process having been initiated on 14 April 2018, pleadings were completed on 26 July 2019. An affidavit of evidence was filed on behalf of the claimant on 28 June 2021. The application for impleadment thereafter came to be filed on or about May 2022. In the aforesaid application, NHAI referred to the various obligations which stood placed upon the State of U.P. under the SSA and appears to have urged that since the obligations of the said State Government were inextricably intertwined with the rights and obligations of parties stipulated in the C.A., its presence before the Arbitral Tribunal as a necessary party was imperative.

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[2] C.A.
[3] NHAI
[4] SSA

4. It was contended that Claim No. 6 pertained to the respondent seeking an extension of the concession period due to construction of competing roads. The aforesaid claim came to be raised on the allegation that two competing roads, namely, the Noida to Agra Expressway and Agra to Lucknow Expressway had come to be opened in December 2015. The respondent/claimant asserted that on account of the construction and opening of the aforesaid competing facilities, the claimant could not achieve the revenues estimated at the time of financial closure. It had accordingly prayed for the grant of an extension of the concession period in light of the aforesaid claim.

5. NHAI, on the other hand, contended before the Arbitral Tribunal that notwithstanding and without prejudice to its contention that the aforesaid facility was not a competing road, since the same had been constructed and built by the Government of U.P., any finding that the Arbitral Tribunal may come to render on the aforesaid issue would, in the absence of the State of U.P., also have an impact on any separate arbitration that may be initiated between the claimant/ concessionaire, NHAI and the State of U.P. It was asserted that in such a situation the specter of conflicting findings coming to be rendered could not be discounted. It was in the aforesaid backdrop that a prayer was made for impleadment of the Government of U.P. as a party to the arbitral proceedings.

6. The Arbitral Tribunal has in terms of a detailed order of 16 August 2022 after noticing the rival contentions which were addressed, proceeded to reject the aforesaid application in the following terms: -

"On consideration of the rival stands, the Tribunal holds that the application is sans merit and deserves rejection, which it directs. The reasons for such rejection are as follows: -

(i) The Respondent's stand that even though CPC is inapplicable in view of Section 19 of the Act, yet, for effective adjudication of the issues, the impleadment is warranted is without any foundation. Sub-section (2) of Section 19 provides that the procedure to be followed can be fixed by the Tribunal so far as conducting the proceedings is concerned. In the present case, the first procedural order, the parameters of its exercise were stipulated by the Tribunal.

(ii) Almost all decisions relied upon by the Respondent in support of the application are founded on the group of companies' and alter ego concepts. In the instant case, by no stretch of imagination, it can be said that these aspects are applicable to the Respondent and the Government of Uttar Pradesh.

(iii) Under the SSA, a specific Dispute Resolution Mechanism is provided. The hypothetical and presumptuous stand of the Respondent that there may be conflicting views is too brittle to be accepted. When any arbitral award is delivered, it is based on the facts, the pleaded case of the parties, the evidence / material placed for adjudication. It is a settled position in law that arbitral awards have no precedent value because of the special features surrounding an arbitration proceeding.

(iv) There is undisputedly no pleading whatsoever either in the Statement of Defence or the Counterclaim, by the Respondent to the effect that Government of Uttar Pradesh is a necessary party. As observed by the Hon'ble Supreme Court in Ram Swarup Gupta v Bishun Narain Inter College & Ors, (1987) 2 SCC 555, Mudi Gowdappa v Ram Chander, AIR 1969 SC 1076, K.V. Narain Rao v P. Purushottam Rao, AIR 1993 SC 1698 and Daulat Ram Chauhan v Anand Sharma, AIR 1984 SC 621, no evidence without pleading with specific particulars can be accepted.

The Hon'ble Supreme Court in Ram Swarup Gupta supra held as follows:

"…It is well settled that in the absence of pleading, evidence, if any, produced by the parties cannot be

> considered. It is also equally settled that no party should be permitted to travel beyond its pleading and that all necessary and material facts should be pleaded by the party in support of the case set up by it."
>
> Accordingly, as noted supra, the application is dismissed. It is made clear that any observation and / or conclusion in the present Order is solely for the purpose of disposal of this application and not for any other purpose. No view is expressed on the merits of the claims which shall be decided at the appropriate stage.
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> The Order being unanimous, is signed by the Presiding Arbitrator."

7. Mr. Mittal, learned counsel appearing for the petitioner, contended that the Arbitral Tribunal had clearly failed to bear in mind the salient principles which were enunciated by the Supreme Court in **Chloro Controls India (P) Ltd. vs. Severn Trent Water Purification Inc.**[5]**, Cheran Properties Ltd. vs. Kasturi & Sons Ltd.**[6] and **Ameet Lalchand Shah & Ors. vs. Rishabh Enterprises & Anr.**[7] which had consistently recognized the principle of non-signatories to an arbitration agreement being joined in proceedings by virtue of the provisions contained in the Act. According to the learned counsel, the C.A. as well as the SSA and the various provisions incorporated therein clearly satisfied the test of a "composite transaction" as enunciated in the aforenoted decisions and, therefore, the Arbitral Tribunal clearly committed a patent and manifest illegality in turning down the application which was made.

[5] (2013) 1 SCC 641
[6] (2018) 16 SCC 413
[7] (2018) 15 SCC 678

8. Learned counsel drew the attention of the Court to the following observations as appearing in the judgment of the Supreme Court in **Chloro Controls:-**

> **"70.** Normally, arbitration takes place between the persons who have, from the outset, been parties to both the arbitration agreement as well as the substantive contract underlining (*sic* underlying) that agreement. But, it does occasionally happen that the claim is made against or by someone who is not originally named as a party. These may create some difficult situations, but certainly, they are not absolute obstructions to law/the arbitration agreement. Arbitration, thus, could be possible between a signatory to an arbitration agreement and a third party. Of course, heavy onus lies on that party to show that, in fact and in law, it is claiming "through" or "under" the signatory party as contemplated under Section 45 of the 1996 Act. Just to deal with such situations illustratively, reference can be made to the following examples in *Law and Practice of Commercial Arbitration in England* (2nd Edn.) by Sir Michael J. Mustill:
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> "1. The claimant was in reality always a party to the contract, although not named in it.
>
> 2. The claimant has succeeded by operation of law to the rights of the named party.
>
> 3. The claimant has become a party to the contract in substitution for the named party by virtue of a statutory or consensual novation.
>
> 4. The original party has assigned to the claimant either the underlying contract, together with the agreement to arbitrate which it incorporates, or the benefit of a claim which has already come into existence."
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> **71.** Though the scope of an arbitration agreement is limited to the parties who entered into it and those claiming under or through them, the courts under the English law have, in certain cases, also applied the "group of companies doctrine". This doctrine has developed in the international context, whereby an arbitration agreement entered into by a company, being one within a group of companies, can bind its non-signatory affiliates or sister or parent concerns, if the circumstances demonstrate that the mutual intention of all the parties was to bind both the signatories and the non-signatory affiliates. This theory has been applied in a number of arbitrations so as to justify a tribunal taking jurisdiction over a party who is not a

signatory to the contract containing the arbitration agreement. [*Russell on Arbitration* (23rd Edn.)]

72. This evolves the principle that a non-signatory party could be subjected to arbitration provided these transactions were with group of companies and there was a clear intention of the parties to bind both, the signatory as well as the non-signatory parties. In other words, "intention of the parties" is a very significant feature which must be established before the scope of arbitration can be said to include the signatory as well as the non-signatory parties.

73. A non-signatory or third party could be subjected to arbitration without their prior consent, but this would only be in exceptional cases. The court will examine these exceptions from the touchstone of direct relationship to the party signatory to the arbitration agreement, direct commonality of the subject-matter and the agreement between the parties being a composite transaction. The transaction should be of a composite nature where performance of the mother agreement may not be feasible without aid, execution and performance of the supplementary or ancillary agreements, for achieving the common object and collectively having bearing on the dispute. Besides all this, the court would have to examine whether a composite reference of such parties would serve the ends of justice. Once this exercise is completed and the court answers the same in the affirmative, the reference of even non-signatory parties would fall within the exception afore-discussed."

9. Mr. Mittal also sought to draw sustenance from the following principles as were laid down in **Cheran Properties:-**

"20. Both these decisions were prior to the three-Judge Bench decision in *Chloro Controls* [*Chloro Controls India (P) Ltd.* v. *Severn Trent Water Purification Inc.*, (2013) 1 SCC 641 : (2013) 1 SCC (Civ) 689] . In *Chloro Controls* [*Chloro Controls India (P) Ltd.* v. *Severn Trent Water Purification Inc.*, (2013) 1 SCC 641 : (2013) 1 SCC (Civ) 689] this Court observed that ordinarily, an arbitration takes place between persons who have been parties to both the arbitration agreement and the substantive contract underlying it. English Law has evolved the "group of companies doctrine" under which an arbitration agreement entered into by a company within a group of corporate entities can in certain circumstances bind non-signatory affiliates. The test as formulated by this Court,

noticing the position in English law, is as follows : (SCC pp. 682-83, paras 71 & 72)

> "*71*. Though the scope of an arbitration agreement is limited to the parties who entered into it and those claiming under or through them, the courts under the English law have, in certain cases, also applied the "group of companies doctrine". This doctrine has developed in the international context, whereby an arbitration agreement entered into by a company, being one within a group of companies, can bind its non-signatory affiliates or sister or parent concerns, if the circumstances demonstrate that the mutual intention of all the parties was to bind both the signatories and the non-signatory affiliates. This theory has been applied in a number of arbitrations so as to justify a tribunal taking jurisdiction over a party who is not a signatory to the contract containing the arbitration agreement. [*Russell on Arbitration* (23rd Edn.)]
>
> *72*. This evolves the principle that a non-signatory party could be subjected to arbitration provided these transactions were with group of companies and there was a clear intention of the parties to bind both, the signatory as well as the non-signatory parties. In other words, "intention of the parties" is a very significant feature which must be established before the scope of arbitration can be said to include the signatory as well as the non-signatory parties."

The Court held that it would examine the facts of the case on the touchstone of the existence of a direct relationship with a party which is a signatory to the arbitration agreement, a "direct commonality" of the subject-matter and on whether the agreement between the parties is a part of a composite transaction : (SCC p. 683, para 73)

> "*73*. A non-signatory or third party could be subjected to arbitration without their prior consent, but this would only be in exceptional cases. The court will examine these exceptions from the touchstone of direct relationship to the party signatory to the arbitration agreement, direct commonality of the subject-matter and the agreement between the parties being a composite transaction. The transaction should be of a composite nature where performance of the mother agreement may not be feasible without aid, execution and performance of the supplementary or ancillary agreements, for achieving the common object and collectively having bearing on the dispute. Besides all this, the Court would have to examine whether a composite reference of such parties would serve the ends of justice. Once this exercise is completed and the Court answers the same in the affirmative,

the reference of even non-signatory parties would fall within the exception afore-discussed."

21. Explaining the legal basis that may be applied to bind a non-signatory to an arbitration agreement, this Court in *Chloro Controls case* [*Chloro Controls India (P) Ltd.* v. *Severn Trent Water Purification Inc.*, (2013) 1 SCC 641 : (2013) 1 SCC (Civ) 689] held thus : (SCC p. 694, paras 103.1, 103.2 & 105)

"*103.1*. The first theory is that of implied consent, third-party beneficiaries, guarantors, assignment and other transfer mechanisms of contractual rights. This theory relies on the discernible intentions of the parties and, to a large extent, on good faith principle. They apply to private as well as public legal entities.

103.2. The second theory includes the legal doctrines of agent-principal relations, apparent authority, piercing of veil (also called "the alter ego"), joint venture relations, succession and estoppel. They do not rely on the parties' intention but rather on the force of the applicable law.

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105. We have already discussed that under the group of companies doctrine, an arbitration agreement entered into by a company within a group of companies can bind its non-signatory affiliates, if the circumstances demonstrate that the mutual intention of the parties was to bind both the signatory as well as the non-signatory parties."

23. As the law has evolved, it has recognised that modern business transactions are often effectuated through multiple layers and agreements. There may be transactions within a group of companies. The circumstances in which they have entered into them may reflect an intention to bind both signatory and non-signatory entities within the same group. In holding a non-signatory bound by an arbitration agreement, the court approaches the matter by attributing to the transactions a meaning consistent with the business sense which was intended to be ascribed to them. Therefore, factors such as the relationship of a non-signatory to a party which is a signatory to the agreement, the commonality of subject-matter and the composite nature of the transaction weigh in the balance. The group of companies doctrine is essentially intended to facilitate the fulfilment of a mutually held intent between the parties, where the circumstances indicate that the intent was to bind both signatories and non-signatories. The effort is to find the true essence of the business arrangement and to unravel from a layered structure of commercial arrangements, an intent to bind

someone who is not formally a signatory but has assumed the obligation to be bound by the actions of a signatory.

25. Does the requirement, as in Section 7, that an arbitration agreement be in writing exclude the possibility of binding third parties who may not be signatories to an agreement between two contracting entities? The evolving body of academic literature as well as adjudicatory trends indicate that in certain situations, an arbitration agreement between two or more parties may operate to bind other parties as well. Redfern and Hunter explain the theoretical foundation of this principle:

> "… The requirement of a signed agreement in writing, however, does not altogether exclude the possibility of an arbitration agreement concluded in proper form between two or more parties also binding other parties. Third parties to an arbitration agreement have been held to be bound by (or entitled to rely on) such an agreement in a variety of ways: first, by operation of the 'group of companies' doctrine pursuant to which the benefits and duties arising from an arbitration agreement may in certain circumstances be extended to other members of the same group of companies; and, secondly, by operation of general rules of private law, principally on assignment, agency, and succession…. [*Id* at p. 99.] "

The group of companies doctrine has been applied to pierce the corporate veil to locate the "true" party in interest, and more significantly, to target the creditworthy member of a group of companies [Op cit fn. 16, 2.40, p. 100.] . Though the extension of this doctrine is met with resistance on the basis of the legal imputation of corporate personality, the application of the doctrine turns on a construction of the arbitration agreement and the circumstances relating to the entry into and performance of the underlying contract. [*Id*, 2.41 at p. 100.]

26.*Russell on Arbitration* [24th Edn., 3-025, pp. 110-11.] formulates the principle thus:

> "Arbitration is usually limited to parties who have consented to the process, either by agreeing in their contract to refer any disputes arising in the future between them to arbitration or by submitting to arbitration when a dispute arises. A party who has not so consented, often referred to as a third party or a non-signatory to the arbitration agreement, is usually excluded from the arbitration. There are however some occasions when such a third party may be bound by the agreement to arbitrate. For example, …, assignees and representatives may become a party to the arbitration agreement in place of the original signatory on the basis that

> they are successors to that party's interest and claim "through or under" the original party. The third party can then be compelled to arbitrate any dispute that arises."

28. Explaining group of companies doctrine, Born states:

> "the doctrine provides that a non-signatory *may* be bound by an arbitration agreement where a group of companies exists *and* the parties have engaged in conduct (such as negotiation or performance of the relevant contract) or made statements indicating the intention assessed objectively and in good faith, that the non-signatory be bound and benefited by the relevant contracts. [*Id* at pp. 1448-49.] "

While the alter ego principle is a rule of law which disregards the effects of incorporation or separate legal personality, in contrast the group of companies doctrine is a means of identifying the intentions of parties and does not disturb the legal personality of the entities in question. In other words:

> "the group of companies doctrine is akin to principles of agency or implied consent, whereby the corporate affiliations among distinct legal entities provide the foundation for concluding that they were intended to be parties to an agreement, notwithstanding their formal status as non-signatories. [*Id* at p. 1450.] "

29. The decision in *Indowind* [*Indowind Energy Ltd.* v. *Wescare (India) Ltd.*, (2010) 5 SCC 306 : (2010) 2 SCC (Civ) 397] arose from an application under Section 11 of the Arbitration and Conciliation Act, 1996. Indowind was not a signatory to the contract and was held not to be a party to the agreement to refer disputes to arbitration. *Indowind* [*Indowind Energy Ltd.* v. *Wescare (India) Ltd.*, (2010) 5 SCC 306 : (2010) 2 SCC (Civ) 397] held that an application under Section 11 was not maintainable. The present case does not envisage a situation of the kind which prevailed before this Court in *Indowind* [*Indowind Energy Ltd.* v. *Wescare (India) Ltd.*, (2010) 5 SCC 306 : (2010) 2 SCC (Civ) 397] . The present case relates to a post award situation. The enforcement of the arbitral award has been sought against the appellant on the basis that it claims under KCP and is bound by the award. Section 35 of the Arbitration and Conciliation Act, 1996 postulates that an arbitral award "shall be final and *binding on the parties and persons claiming under them* respectively" (emphasis supplied). The expression "claiming under", in its ordinary meaning, directs attention to the source of the right. The expression includes cases of devolution and assignment of interest (*Advanced Law Lexicon by P. Ramanatha Aiyar* [3rd Edn., Vol. I, p. 818.]).

> The expression "persons claiming under them" in Section 35 widens the net of those whom the arbitral award binds. It does so by reaching out not only to the parties but to those who claim under them, as well. The expression "persons claiming under them" is a legislative recognition of the doctrine that besides the parties, an arbitral award binds every person whose capacity or position is derived from and is the same as a party to the proceedings. Having derived its capacity from a party and being in the same position as a party to the proceedings binds a person who claims under it. The issue in every such a case is whether the person against whom the arbitral award is sought to be enforced is one who claims under a party to the agreement."

10. Mr. Mittal had taken the Court in great detail through the various provisions contained in the C.A. as well as the SSA in order to establish that the two were clearly interconnected and gave rise to mutual obligations and duties cast upon the State of U.P., NHAI and the Concessionaire. In view of the above, learned counsel urged that the impleadment application was liable to be allowed.

11. Appearing for the respondent, Mr. Sethi, learned senior counsel, at the outset questioned the very maintainability of the petition and submitted that the order passed by the Tribunal cannot possibly be understood to be an award or an interim award which could be subjected to challenge by way of a petition under Section 34 of the Act.

12. Mr. Sethi, firstly drew the attention of the Court to the decision in **Goyal MG Gases Private Limited vs. Panama Infrastructure Developers Private Limited and Others**[8] where an order of an Arbitral Tribunal rejecting an application for impleadment had come to be assailed under Section 34 of the Act. The aforesaid challenge, Mr. Sethi pointed out, was negatived on the ground of the

[8] 2019 SCC OnLine Del 9067

maintainability of the petition itself, as would be evident from the following passages of that decision: -

> "8. It is, thus, Mr. Aggarwal's contention that the issue of the kind which was raised by the petitioner in its application which was disposed of by the arbitral tribunal by the impugned order resulted in an interim award and, therefore, the Section 34 petition would lie as contemplated under Section 16(6) of the 1996 Act.
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> 9. I am unable to agree with the contention of Mr. Aggarwal.
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> 10. The application praying for impleadment of third parties is not a matter which would dovetail into the final award. The fact that the petitioner is aggrieved by disposal of such an application would not morph the order into an interim arbitral award as contended by Mr. Aggarwal."

13. The issue of the evident distinction between various procedural orders that may be passed by an Arbitral Tribunal and the essential ingredients of what would constitute an award under the Act were lucidly explained in **Rhiti Sports vs. Powerplay Sports**[9] which was also cited by Mr. Sethi for the consideration of this Court. It would be relevant to advert to the following observations and principles as were laid down by the learned Judge in **Rhiti Sports:-**

> "**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.

[9] 2018 SCC OnLine Del 8678

17. As indicated above, a final award would necessarily entail of (i) all disputes incase 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 theawards, and they are empowered to arrive at decisions which enable those processes to be performed. The exercise of these powers are, however, antecendent 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 Partasides, 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."

14. Reverting to the merits of the prayer made in the impleadment application, Mr. Sethi, submitted that the State of U.P. could neither be described to be a necessary party nor a proper party since the prayer for extension of the concession period was based primarily on

Clause VIII of the C.A. and which conferred a right on the Concessionaire to seek extension of the concession period in case an additional tollway came to be opened. According to Mr. Sethi, Claim No. 6 rested on the provisions contained in the aforenoted clause and therefore, also the prayer for impleadment of the Government of U.P. was thoroughly misconceived.

15. In order to appreciate the submission addressed on this score, it would be relevant to extract Clause VIII of the C.A. hereinbelow: -

> "**VIII ADDITIONAL TOLLWAY**
>
> 8.1 Notwithstanding anything to the contrary contained in this Agreement, any of NHAI, GOL or GOUP may construct and operate either itself or have the same, inter alia, built and operated on BOT basis or otherwise any Expressway or other toll road, not being a by-pass, between, inter alia, Lucknow - Sitapur section from km 488.270 to km 413.200 of NH-24 in the State of Uttar Pradesh (the "Additional Tollway") provided that such Additional Tollway shall not be opened to traffic before expiry of 8 (eight) years from the Appointed Date.
>
> 8.2 In the event of NHAI, GOI, or GOUP, as the case may be, constructing or permitting construction of any Additional Tollway as set forth in this Clause 8.2, and the Additional Tollway is commissioned at any time after 8 (eight) years from the Appointed Date, then the Concession Period shall be increased by half the number of years by which such commissioning precedes the expiry of the Concession Period.
>
> 8.3 Upon commissioning of the Additional Tollway, the Concessionaire shall continue to levy and collect the Fee under this Agreement and shall not offer any discounts or reductions in such Fee except with the prior written consent of NHAI. Provided, however, that any such discounts or reductions that the Concessionaire had offered to any general or special class of users or vehicles for a continuous period of three years prior to the commissioning of the Additional Tollway may continue in the same form and manner after the commissioning of such Additional Tollway.

> 8.4 NHAI shall ensure that the per kilometer fee to be levied and collected from any vehicle or class of vehicles using the Additional Tollway shall at no time be less than an amount which is 133% of the per kilometer Fee levied and collected from similar vehicles or class of vehicles using the Project Highway."

16. The Court, at the outset, notes that the order which stands impugned in the present petition does not decide a fundamental question or a substantive dispute that may be said to form the subject matter of arbitration. The Arbitral Tribunal has also not ruled upon any claim which may have been raised by parties. For an order of the Tribunal to be understood as an award, it is essential that it answer the attributes of a decision touching upon the merits of the dispute between the parties or conclusively settling an issue or answering a question which pertains to the heart of the dispute. An order of the Arbitral Tribunal, to put it differently, in order to constitute an award, interim or otherwise, would be one which decides a substantive dispute or question which exists between the parties. In order to qualify as an award, the decision must be with respect to an issue which constitutes a vital element of the dispute.

17. As was correctly explained by the Court in **Rhiti Sports,** in order to hold that an order passed by the Tribunal has the attributes of an award, it would have to be established that the same decides *"matters of moment"* or disposes of a substantive claim raised by parties. This has been duly recognised by precedents as well as the authoritative texts noticed in **Rhiti Sports,** as orders which effectively conclude a fundamental dispute or question that stands raised on merits as distinguished from mere procedural orders.

18. As this Court views and considers the order of the Tribunal impugned herein, it is of the firm opinion that the same fails to answer the attributes of an award as is understood under the provisions of the Act. The order impugned neither finally decides a question touching upon the merits of the respective claims nor does it decisively conclude a dispute which exists between the parties. The impugned order also fails to answer to the attributes of a determination of an issue which could be said to have a bearing on the ultimate reliefs sought by parties. The respondent would still have to establish whether the concession period is liable to be extended in light of the provisions contained in the C.A. Whether the expressways alluded to would constitute competing roads would also be a question which would be open to be agitated before the Arbitral Tribunal. That Tribunal would still have to consider and decide whether the claim would sustain in terms of Clause VIII.

19. While learned counsel advanced elaborate submissions with respect to non-signatories being bound by an arbitration agreement and the "group of companies" and "alter ego" principles as enunciated in various decisions, he failed to bear in mind that the objection of a necessary party having not been arrayed as a party and its ultimate impact on the relief claimed, would be one which would still be open to be urged before the Arbitral Tribunal. The Court further finds that the Arbitral Tribunal has noted that the respondent who is the claimant has *"dominus litus"*. It would thus continue to carry the burden of proving that the ultimate relief sought under Claim No.6 is liable to be granted against the petitioner. These and other issues would be

available to be asserted before the Arbitral Tribunal notwithstanding the non-impleadment of the State of U.P.

20. The Court ultimately comes to conclude that the petitioner has woefully failed to establish that the impugned order amounts to the Arbitral Tribunal recording a finding which touches upon the heart of the dispute or that it decides an issue which impacts substantive rights of parties. It would clearly not amount to an "arbitral award" within the meaning of Section 2(1)(c) of the Act.

21. In view of the aforesaid, the Court finds substance and merit in the preliminary objection which is raised and comes to the definitive conclusion that the order impugned cannot possibly be understood to be an award which may be open to be assailed under Section 34 of the Act.

22. Consequently, the present petition fails and shall stand dismissed.

23. Pending application also stands disposed of.

YASHWANT VARMA, J.

DECEMBER 22, 2022
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