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

% **Reserved on: 08th December, 2022**
Decided on: 29th March, 2023

\+ **FAO(OS) (COMM) 217/2019 & CM APPL. 40390/2019 (Stay)**

GOYAL MG GASES PVT LTD ..... Appellant

Through: Mr. M.A. Niyazi, Mr. Vinay Juneja, Ms. Kirti Bhardwaj and Mr. Arquam Ali, Advocates.

V

PANAMA INFRASTRUCTURE DEVELOPERS PVT LTD & ORS ..... Respondents

Through: Mr. Ajay K. Jain and Mr. Pulkit Agarwal Advocates.

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

J U D G M E N T

SUDHIR KUMAR JAIN, J.

1. The present appeal has been filed under section 37(1)(c) of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as **"the Act"**) read with section 13 of the Commercial Courts Act, 2015 to impugn the order dated 05.07.2019 passed by the learned Single Judge in O.M.P. (COMM) 235/2019.

2. Briefly stated, the relevant facts are that the respondents were owners of 11 windmill assets consisting of land, load and machines in Karnataka and entered into 5 separate sale agreements dated 02.09.2016 for the sale of aforesaid 11 windmill projects, as ongoing business/units to the appellant for the sale consideration of Rs.19.62 crores and Addendums were also executed on 02.09.2016 to aforesaid Agreements to Sell.

2.1 The appellant had paid Rs.1.96 crores as advance under the Agreements to Sell and the Addendums dated 02.09.2016 to the respondents. The appellant was required to carry out due diligence in 30 days subject to the fulfillment of the conditions i.e. permission by seller/O&M Contractor for the site inspection and receipt of all required documentation by the appellant within 30 days.

2.2 The appellant vide e-mail dated 08.09.2016, requested the respondents to provide necessary documents but failed to provide complete set of requisite documents. The respondents also did not fulfil the first condition of site inspection i.e. an NOC from Operations and Maintenance (O&M) Contractor.

2.3 As per Clauses 9 of the Agreement to Sell dated 02.09.2016, the seller shall not offer the wind power project for sale to any other party unless the

buyer opts to exit from this agreement in writing. The respondents unilaterally terminated the Agreement to Sell dated 02.09.2016, despite the appellant never exercised its right to exit from the said agreement.

2.4 The appellant filed petitions under section 9 of the Act whereby the respondents vide common interim order dated 20.12.2017 were directed to maintain the status quo regarding the possession and ownership of the windmill projects in terms of 5 Agreements to Sell dated 02.09.2016. The respondents filed the reply.

2.5 The appellant filed a petition under section 11 of the Act against the respondents and vide order dated 29.05.2018, this court had appointed a former Judge of this court as Sole Arbitrator. The appellant filed common statement of claim of 11 windmills along with application under section 17 of the Act. The said applications were disposed of by the Arbitral Tribunal vide order dated 08.08.2018. The respondents filed statement of defence on 14.09.2019 wherein the respondents, for the first time, disclosed details of the alleged sale of 11 windmill projects vide Agreement to Sell dated 19.07.2017 for total consideration of Rs.7 crores. The appellant also filed fresh application under section 17 of the Act for interim relief seeking direction against the respondents to deposit the sale consideration receipt

from the alleged sale of 11 windmills and the said application was dismissed vide order dated 23.03.2019 passed by the Arbitral Tribunal.

2.6. The appellant on 29.04.2019 moved an application under Order 1 Rule X of the Civil Procedure Code, 1908 (hereinafter referred to as **"the CPC"**) before the learned Sole Arbitrator for impleadment of transferees i.e. (i) One Ohm Thought Power India Private Limited; (ii) Berkley Learning Private Limited; (iii) SML Electricals India Private Limited and (iv) M/s AS Infra, to whom the respondents had allegedly sold and transferred the 11 windmill projects vide Agreement to Sell dated 19.07.2017 in violation to Agreement to Sell dated 02.09.2016. The learned Sole Arbitrator vide order dated 14.05.2019 dismissed the said application for impleadment of the subsequent transferees in the arbitration proceedings. The learned Sole Arbitrator observed as under:-

> *(i) "... this Tribunal is of the view that if a decree is ultimately passed in favour of the claimant and his prayer for specific performance is granted, the sale agreement by virtue of which the respondent has sold the windmills to the third parties would necessarily would be declared null and void"*
> *(ii) "...The 4 aforenoted parties (as referred in para 2) sought to be impleaded are neither necessary nor proper parties. These arbitral proceedings can proceed inter se the claimant and respondent well without they being joined as parties..."*

3. The appellant filed a petition under section 34 of the Act to challenge

the order dated 14.05.2019 on the grounds that the Arbitral Tribunal passed the interim award against the public policy. The learned Sole Arbitrator has failed to consider that the respondents disclosed about the alleged Sale Agreements to the subsequent buyers only on 14.09.2018 when the respondents filed their statement of defence along with true copies of the Agreement to Sell dated 19.07.2017 executed between the respondents and the subsequent buyers showing the alleged transaction of 11 windmill projects. The learned Sole Arbitrator did not consider that till 14.09.2018, there was no document to show any sale transaction between the respondents and the subsequent buyers and the non-signatory to the Arbitration Clause can also be impleaded as observed by the Supreme Court in ***Cheran Properties Ltd. V Kasturi & Sons Ltd.,*** (2018) 16 SCC 413 and in other judgments delivered by the Supreme Court. The appellant also raised various other grounds to challenge the orders passed by the learned Sole Arbitrator.

4. The learned Single Judge vide impugned order dated 05.07.2019, dismissed the petition under section 34 of the Act on the grounds of maintainability as well as on merits. The learned Single Judge observed as under:-

"4. I must indicate at the very outset that it is my understanding that petition under Section 34 would not lie qua the impugned order which, as indicated above, dealt with an application for impleadment of third parties who concededly are not parties to the arbitration agreement.

8.1 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.

8.2 I have not been shown any authority which is directly on the point and takes a view contrary to what is stated herein above.

9. Be that as it may, even on merits I find that the petition is not sustainable.

14.1 Besides this, the arbitral tribunal has also taken the view and, in my opinion correctly, that if the reliefs claimed by the petitioner which are in the nature of specific performance of the agreement dated 2.9.2016 and for declaring the sale agreements dated 19.7.2017 entered into between respondents and the third parties as null and void- are allowed, then, a "meaningful decree" would be available to, the petitioner in the matter.

15. Mr. Aggarwal's submission that the petitioner would have no recourse against the third party entities who have bought the "windmill assets" situate in Karnataka is, to my mind, an erroneous plea for the reason that the third parties cannot get a better title than the respondents.

15.1 Besides this, in my view, it is important to bear in mind that every order passed by an arbitral tribunal which may impact the final award does not result in an interim award. An award is like a judicial decree which not only determines the rights of the parties with regard to matters in issue but also gives the reasons for reaching such a determination. Therefore, an interim order passed by an arbitral tribunal at an interim stage has to be tested on these parameters before it can be said that it is in nature of an interim award. The impugned order, in my view, tested on these parameters, cannot qualify as an interim award.

16. Therefore, if the petitioner were to succeed finally in the matter before the arbitral tribunal, it will have an award which hopefully would morph into a decree which can give petitioner a cause of action

to proceed further in the matter both against the respondents and perhaps the third party entities.
17. The apprehensions expressed by Mr. Aggarwal, in my view, are misplaced.
18. I find no merit in the petition both on the ground of maintainability as well as on merits.
19. The petition is, accordingly, dismissed."

5. The learned counsel for the appellant primarily advanced oral arguments and also submitted written arguments. The learned counsel for the appellant argued that the present appeal needs consideration on two questions of law, which are:-

(i) Whether the alleged subsequent buyer who is not signatory to the arbitration agreement can be impleaded in the arbitral proceedings;
(ii) Whether an application rejecting a prayer for impleadment can constitute an interim award.

5.1 The counsel for the appellant in support of his contentions as mentioned hereinabove, cited ***Kasturi V lyyamperumal & Ors.,*** (2005) 6 SCC 733 wherein it was observed as under:-

"In our view, a bare reading of this provision, namely, second part of Order 1 Rule 10 sub-rule (2) CPC would clearly show that the necessary parties in a suit for specific performance of a contract for sale are the parties to the contract or if they are dead, their legal representatives as also a person who had purchased the contracted property from the vendor. In equity as well as in law, the contract constitutes rights and also regulates the liabilities of the parties. A purchaser is a necessary party as he would be affected if he had purchased with or without notice of the contract, but a person who claims adversely to the claim of a vendor is, however, not a necessary

party. From the above, it is now clear that two tests are to be satisfied for determining the question who is a necessary party. Tests are
(1) there must be a right to some relief against such party in respect of the controversies involved in the proceedings;
(2) no effective decree can be passed in the absence of such party."

5.2 The counsel for the appellant also relied on the decisions in ***Cheran Properties Ltd. V Kasturi & Sons Ltd.,*** (2018) 16 SCC 413 and in ***Nirmala Jain &Ors. V Jasbir Singh & Ors.,*** 256 (2019) DLT 186[DB], for the proposition that a third party, who is non signatory subsequent purchaser can be impleaded in arbitral proceedings.

6. The counsel for the respondents submit that it is only the parties to an agreement alone who are bound by the arbitral proceedings and no third party can be impleaded.

7. In regard to the legal proposition that whether a non-signatory subsequent buyer can be impleaded in the arbitration proceedings, the Supreme Court in ***Chrolo Controls India Private Ltd. V Severn Trent Water Purification Inc. and Ors.,*** (2013) 1 SCC 641 held that the parties who are not signatory can be joined in arbitration proceedings. It was observed as under:-

"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: "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."

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."

7.1 In the case of ***Cheran Properties Ltd. V Kasturi & Sons Ltd.,*** (2018) 16 SCC 413 the Supreme Court held as under:-

"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.

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, 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. RamanathaAiyar [3rdEdn., 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."*

8. The perusal of above cited decisions delivered by the Supreme Court reflects that a party which is non-signatory to the agreement can be impleaded as a necessary party in Arbitration Proceedings. However, issue which needs judicial consideration and determination is that whether an

order dismissing application under Order 1 Rule X CPC can be taken as an interim award.

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:-

> *"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, 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 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."

10. A Co-ordinate Bench of this court, in O.M.P.(COMM) 477/2022, titled ***National Highway Authority of India V Lucknow Sitapur Expressway Ltd.,*** also observed as under:-

"...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..."

11. It is reflecting that an order would said to be an award or interim award when it decides a substantive dispute which exists between the parties. It is essential before an order can be understood as an award that it answers the attributes of the decision on the merits of the dispute between the parties or accords in conclusively settling a dispute which pertains to core issue. Therefore to qualify as an award it must be with respect to an issue which constitutes a vital aspect of the dispute. As held in the case of ***Rhiti Sports*** the order passed by the arbitral tribunal would have the attributes of an interim award when same decides the 'matters of moment' or disposes of a substantive claim raised by the parties. Accordingly, an order passed by the

Arbitral Tribunal rejecting the application for impleadment neither decides the substantive question of law nor touches upon the merits of the case. The impugned order, as such, has not travelled the distance to answer the attributes of determination of an issue.

12. The learned Sole Arbitrator rightly observed that the subsequent transferees are neither the necessary parties nor proper parties for disposal of the claims and arbitral proceedings can proceed between the appellant and the respondents and if the decree is passed in favour of the appellant, in that eventuality subsequent sale agreement shall become null and void.

13. We do not find any illegality in the impugned order which could call for interference by this court.

14. Accordingly, the present appeal along with pending applications, if any, stands dismissed.

(SUDHIR KUMAR JAIN)
JUDGE

(NAJMI WAZIRI)
JUDGE

MARCH 29, 2023
N/SD