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Any order refusing to adjudicate counter claims will constitute an interim order susceptible to challenge under Section 34 of the Arbitration and Conciliation Act, 1996

National Highways Authority of India v. Abhijeet Angul Sambalpur Toll Road Limited

Case No.	Commercial Arbitration Petition (L.) No. 224 of 2021
Date	28 Feb 2022
Court	High Court of Delhi
Coram	Hon'ble Mr. Justice C. Hari Shankar

1. FACTUAL MATRIX AND PROCEDURAL HISTORY:

- 1.1. This matter arose from an application filed by the petitioner u/s 17 of the Arbitration and Conciliation Act, 1996 (“**1996 Act**”) before the Arbitral Tribunal in Delhi.
- 1.2. While deciding this application, the Arbitral Tribunal passed an order granting liberty to file counterclaims for ₹12.2 crore *vide* its order dated 24th September 2019.
- 1.3. Thereafter, the petitioner filed new counter-claims (which included the counterclaim for ₹12.2 crore and several other counterclaims) before the Arbitral Tribunal. All the counterclaims aside from the counterclaim for ₹12.2 crore were rejected on the ground that liberty was only given in the order u/s. 17 for this particular counter claim.
- 1.4. Consequently, the petitioner filed a petition u/s 34 of the 1996 Act before the Delhi High Court (“**High Court**”) against the order of the Arbitral Tribunal refusing to adjudicate the fresh counter claims made by NHAI in the arbitral proceedings.

2. ISSUE:

- 2.1 Whether the order rejecting the counter claim is an interim award susceptible to challenge u/s 34 of the 1996 Act?

3. CONTENTIONS OF THE PETITIONER:

- 3.1 The petitioner submitted that the petition u/s 34 of the 1996 Act is maintainable since the decision to reject a counterclaim is an interim award passed by the Tribunal.
- 3.2 On the Tribunal's decision to reject counterclaims- The Tribunal could not have rejected the other counterclaims because the right of petitioner to file counter claim existed independently of liberty granted by the Arbitral Tribunal. It was also contended that the Arbitral Tribunal ought to have considered the counterclaims and assessed it on the merits and grounds such as limitation instead of rejecting it purely based on the order u/s 17 of the 1996 Act.

4. CONTENTIONS OF THE RESPONDENT:

- 4.1 The respondent contested the maintainability of the petition. It was argued that the order of the Arbitral Tribunal could not be regarded as an Interim award. Reliance was placed on the judgement of *Lindsay International Pvt Ltd v. IFGL Refectories Ltd.*¹ In this case the Calcutta HC held that the rejection of counter claims on the ground of limitation was not an “interim award” capable of challenge u/s 34 of the 1996 Act.

5. JUDGEMENT OF THE HIGH COURT:

- 5.1 The High Court found the petition to be maintainable and set aside the arbitral award for the following reasons - The Court held that a decision that the counter-claim is not maintainable is a “decision” which an Arbitral Tribunal can take at the final stage of the proceedings u/s 16 of the 1996 Act. Relying on the judgement of the Hon’ble Supreme court in *Indian Farmers Fertilizer Cooperative Ltd v. Bhadra Products*², the court clarified that such a decision, when taken at an interlocutory stage, would constitute an “interim award” within the meaning of the 1996 Act.
- 5.2 Further, the Court clarified that all “interim awards” will be considered as arbitral awards u/s 2(1) (c) and 31(6) of the 1996 Act. Consequently, it was held that the tribunals’ interim award can be challenged u/s 34 of the 1996 Act.

¹ MANU/WB/0427/2021.

² 2 (2018) 2 SCC 534.

- 5.3 On the merits, the Court held that since the order u/s 17 of the 1996 Act did not restrict the petitioners from filing any counter claims; the interim award passed by the Tribunal will have to be set aside.
- 5.4 The Court also reiterated that right of a party to file counter claims before the Arbitral Tribunal exists independently of any liberty granted to it by the Arbitral Tribunal.

6. PSL OPINION:

- 6.1 This order makes it clear that if the arbitral tribunal brings quietus to an issue which it is competent to decide, then it will constitute an interim award by virtue of Section 31(6) of the 1996 Act. This decision was necessary since it clarified two important points. First, that a decision to reject counterclaims will constitute an interim award u/s 31(6) of the 1996 Act. Second, that an interim award passed u/s 31(6) is capable of challenge just as any other arbitral award u/s 34 of the 1996 Act.