

* IN THE HIGH COURT OF DELHI AT NEW DELHI

% Reserved on: 12th January, 2023
Pronounced on: 21st February, 2023

+ FAO (COMM) 66/2021

&

CM APPL. 33889/2020

BHARAT HEAVY ELECTRICALS LIMITED Appellant

Through: Ms. Mani Gupta, Ms. Iti Pandey &
Ms. Sonali Jain, Advocates.

versus

M/S. ZILLION INFRAPROJECTS PVT. LTD. Respondent

Through: Mr. Sumit Kumar & Ms. Shivani
Shukla, Advocates.

CORAM:

HON'BLE MR. JUSTICE SURESH KUMAR KAIT

HON'BLE MS. JUSTICE NEENA BANSAL KRISHNA

J U D G M E N T

NEENA BANSAL KRISHNA, J

1. The present Appeal under Section 37(1) (c) of the Arbitration and Conciliation Act, 1996 (*hereinafter referred to as the "Act, 1996"*) has been preferred against the Order dated 10.11.2020 of the learned District Judge, Commercial Courts-03, Patiala House Courts dismissing the Objections preferred under Section 34 of the Act, 1996 against the interim Award dated 13.08.2020 passed by the learned Arbitrator.

2. **Facts in brief** are that the appellant invited Tender bearing No.

BHEL/NR/SCT/GVKGOINDWAL/BOILER/709 for erection, testing, commissioning and trial operation of boilers, including ESP, rotating machines and piping of 2X270 MW Units (Unit I & II) at GVK, Goindwal Thermal Power Station, District Tarantaran, Punjab. The Contract was awarded to the respondent for an amount of Rs. 380,000,000/- vide Letter of Intent bearing No. BHEL/NR/SCT/GVKGOINDWAL/BOILER/709 (718) dated 09.07.2010.

3. Certain disputes arose between the parties under the Contract and the respondent/claimant Company invoked arbitration in terms of Clause 33 of the General Instructions to Tenders and Contract dated 09.07.2010 and an Arbitrator was appointed.

4. The learned Arbitrator commenced the hearing on 05.11.2018 but thereafter, adjourned the proceedings *sine die* vide Order dated 12.02.2019 in view of the initiation of CIRP proceedings. The proceedings, however, were later resumed. The respondent filed its Statement of Claim for a sum of Rs. 22,24,10,826/- before the learned Arbitrator on 27.09.2019.

5. The appellant moved an Application under Section 14 of the Insolvency and Bankruptcy Code, 2016 on the ground that no pending proceedings can be continued once the petition against the Creditor

Debtor/respondent was admitted by NCLT and requested that the arbitral proceedings be adjourned *sine die* till the continuation of Resolution Process by the adjudicating authority. The learned Sole Arbitrator on 12.02.2019 adjourned the proceedings *sine die* observing that the appellant herein being an Operational Creditor, may not be in a position to file its Counter-Claim before the Interim Resolution Professional (IRP) appointed by the Arbitral Tribunal, but there is no bar to the Corporate Debtor/respondent herein to continue with the proceedings before the Arbitrator.

6. In the meanwhile, the appellant/Operational Creditor appeared before the Interim Resolution Professional and submitted its claims in Form B under Section 7 of the Insolvency & Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 under various heads. The appellant in Column No. 8 gave “*details of any mutual credit, mutual debts, or other mutual dealings between the corporate person and the operational creditor which may be set-off against the claim*”. The total amount claimed by the appellant was as under:

- (i) *The final amount for the executed work is Rs. 33,15,90,688/-.*
- (ii) *The amount paid for the executed work is Rs. 32,77,45,131/-.*

- (iii) Net payable amount to the respondent is Rs. 38,45,557.88/-.
- (iv) Balance payable amount under the head of PVC is Rs. 15,58,113.97/-.
- (v) Balance payable amount under the head of ORC is Rs. 15,00,000/-.

7. The appellant thus admitted that a total sum of **Rs. 69,03,671.85/-** was liable to be adjusted as set off, from the total amount of Rs. 2,64,19,997.33/- payable to him by the respondent.

8. The respondent/Claimant, on the basis of the documents relied upon by the appellant along with the Statement of Defence before the Arbitrator, filed an Application under Section 31(6) read with Section 17 of the Act, 1996 dated 06.07.2020 for allowing an interim Award in terms of the admitted amount stated as set-off in Form B before the IRP.

9. The appellant herein contested the application and denied having admitted any liability and asserted that the pleadings in respect of set-off as mentioned in Form B before the IRP, were a defence given to it by the statute itself and unless and until the set-off is adjudicated, it does not become binding upon the parties. It cannot be treated as an admission on which an interim Award may be allowed.

10. The Sole Arbitrator *vide* Order dated 13.08.2020 allowed the application of the respondent/Claimant and granted an Interim Award for

a sum of **Rs. 69,03,671.85/-**. The learned Sole Arbitrator recorded in detail her powers under Section 19(4) of the Act, 1996 to determine the admissibility, reliance, materiality and weight of any evidence and her jurisdiction to pass interim orders under Section 17(3) of the Act, 1996. A reference was made to Section 2(c) of the Act, 1996 which defines “Award” to include “*interim Award*”. Reliance was also placed on Numero Uno International Ltd. vs. Prasara Bharti (MANU/DE/0199/2008) & Gammon India Ltd. vs. Sankaranarayana Construction (Bangalore) Pvt. Ltd. (MANU/TN/3737/2009), wherein the power to make an interim Award under Section 31(6) of the Act, 1996, is recognised. The learned Arbitral Tribunal rejected the plea of the appellant that the set-off amount cannot be held as an admission till it is adjudicated. The learned Arbitral Tribunal, thus, allowed the interim award in the sum of Rs. 69,03,671.85/- with the observations that “*it is only an interim Award and at the time of conclusion of arbitral proceedings, if any amount is eventually held payable between the parties, the adjustments can be made and the final Award shall take care of this aspect in order to do justice between the parties.*”

11. The interim Award has been challenged by the appellant under

Section 34 of the Act, 1996 on the following grounds:

- (i) The amount awarded is against the principles as laid down in Order XII Rule 6 of CPC, 1908 which requires that the admission must be clear, unequivocal and categorical. The set-off amount, as claimed by the appellant till adjudicated along with the Claims, cannot be termed as a determined amount or an unequivocal admission on the part of the appellant. There being no admission by the appellant in the present case, no interim award could have been made.
- (ii) The Tribunal erred in ignoring the judgement of Jharkhand Bijili Vitran Nigam Ltd. vs. IVRCL Ltd. (Company Appeal (AT) (Insolvency) No. 285/2018 in which the NCLAT held that claims of the Corporate Debtor can be determined only after the determination of counter-claim, and that the claim and the counter-claim of the parties should be heard together by the Arbitral Tribunal in absence of any bar under Insolvency and Bankruptcy Code, 2016. The claims of the respondent being interlinked and having bearing upon the Counter-Claims of the appellant cannot be segregated and must be adjudicated together. Likewise, the judgement of SSMP Industries Ltd. vs. Perkan Food Processors Pvt. Ltd. (MANU/DE/2362/2019) has been overlooked, wherein it has been held that in case where a Counter-Claim raised against the Corporate Debtor, is an integral part of recovery sought by the Counter-Claimant and is related to the same transaction, then both the claim as well as Counter-Claim ought to be adjudicated

comprehensively by the same forum.

(iii) Additionally, till the defence is adjudicated, there is no threat to the assets of the Corporate Debtor and the continuation of the counter-claim would not adversely impact the Corporate Debtor.

(iv) Furthermore, once the counter-claims are adjudicated and the amount to be paid is determined, at that stage, or in execution proceedings, depending upon the situation as prevalent, Section 14 can be triggered.

12. **The respondent refuted the challenge to the interim Award** by asserting that the appellant has already filed its Claims in Form B for determination before the IRP and any challenge to the impugned Order based on set-off, is an afterthought and without any valid reason. It is asserted that the facts in the case of K.S. Oil Ltd. vs. State Trade Corporation of India Ltd. & Anr. Company Appeal (AT) No. 284/2017 are distinguishable in so much as in that case the Arbitration claim was filed by the Operational Creditor, while in the present case, the Arbitration claim has been filed by Resolution Professional on behalf of the respondent Company which is under moratorium under Section 14 of Insolvency & Bankruptcy Code, 2016.

13. It is asserted that the learned Arbitrator has rightly placed reliance on Nimbus Communication Ltd. vs. Prasara Bharti & Ors.

(MANU/DE/0821/2016) and Numero Uno International Ltd. (supra) to hold that mere filing of the Counter-Claim does not denude the Arbitrator of its power to make an interim Award in the original suit/claim, if such an interim Award is otherwise justified. An interim Award does not in any manner prevent the Arbitrator from making the adjustment of the amount in the final Award, as has also been observed in the impugned Arbitration Award.

14. It was further asserted that the impugned interim Award does not suffer from any perversity or illegality and does not call for any interference under Section 34 of the Act, 1996.

15. The learned District Judge, after considering the rival contentions of the parties, dismissed the petition under Section 34 of the Act, 1996 as being without merit.

16. Aggrieved by the dismissal of the Objections under Section 34 of the Act, 1996, the appellant preferred the present Appeal under Section 37(1) (c) of the Act, 1996.

17. **The main ground of challenge raised in the present Appeal** is that the interim Award dated 13.08.2020 was based on the premise that the set-off/Counter-Claims raised by the Operational Creditor/appellant

herein could not have been filed before the learned Arbitrator, being barred under Section 14 of the Insolvency and Bankruptcy Code, 2016. However, now when the Counter-Claim has been permitted to be filed before the learned Arbitrator pursuant to the Order dated 10.11.2020 of learned District Court, the reasoning for allowing the interim Award does not survive as the set-off can now be adjudicated along with the Claim/counter-claim by the learned Arbitrator.

18. The appellant has, at the same time, challenged the directions given by the learned District Judge that both the claims and counter-claims, including set-off may be heard and adjudicated comprehensively together by the Arbitral Tribunal, as being erroneous on the premise that while deciding objections under Section 34 of the Act, 1996, the Award may be set aside or upheld but no additional directions to modify, vary or remit the Award can be issued, as has been held by this Court in McDermott International Inc. vs. Burn Standard Co. Ltd. (2006) 11 SCC 181.

19. Furthermore, there is no unequivocal admission on the part of the appellant whereby an Award could be made under Section 31(6) of the Act, 1996. Without adjudication of the set-off to determine the amount which is found payable, it cannot be read as an admission independently

for the purpose of passing an interim Award. In absence of any adjudication of the set-off amount, it cannot be held as an admission in any manner.

20. Additionally, the learned District Judge while upholding the interim Award has given independent reasoning ignoring the reasoning adopted by the learned Arbitrator and relied upon the judgements i.e., Nimbus Communications Ltd. (supra) and Numero Uno International Pvt. Ltd. (supra) which are completely distinguishable and not applicable to the facts of the instant case.

21. It is asserted that the impugned Award as well as the Order dated 10.11.2020, dismissing the objections under Section 34 of the Act, 1996, is liable to be set aside.

22. The **respondent has contended** that the appellant has concealed the most important fact that pursuant to the Order dated 10.11.2020 of the learned District Judge upholding the interim Award, the appellant has filed a Counter-Claim for an amount of Rs. 2,64,19,997.33/- before the learned Arbitrator which is pending adjudication. The set-off of Rs. 69,03,671.85/-, as mentioned in Form B filed by the appellant before the IRP, does not find any mention in the Counter-Claim thereby indicating

that the appellant has accepted the judgement of the learned Arbitrator. The appeal is liable to be dismissed on this ground itself.

23. It is further asserted that the facts in hand are squarely covered by the judgements in Nimbus Communications Ltd. (supra), Numero Uno International Ltd. (supra), Cofex Exports Ltd. vs. Canara Bank MANU/DE/0500/1997, Gammon India Ltd. vs. Sankaranarayana Construction (Banglore) Pvt. Ltd. (MANU/TN/3737/2009) and Uttam Singh Dugal & Co. Ltd. vs. Union Bank of India and Ors. (MANU/SC/0485/2000). There is no infirmity in the impugned Order dismissing the objections of the appellant and the appeal is liable to be dismissed.

24. **Submissions heard.**

25. To appreciate the grounds of challenge as raised by the appellant, it is pertinent to first define the scope of interference under Section 34 and Section 37 of the Act, 1996. In Delhi State Industrial & Infrastructure Development Corporation Ltd. vs. M/s. H.R. Builders FAO (OS) (COMM) 77/2022 decided on 03.06.2022, it was held that the scope of interference under Sections 34 and 37 of the Act, 1996 is extremely limited to when '*an award is in conflict with the public policy of India,*

which includes cases of fraud, breach of fundamental policy of Indian law and breach of public morality or is “*patently illegal*” as held by the Apex Court in its decision in McDermott International Inc. (supra). Likewise, the Supreme Court in Anglo-American Metallurgical Coal vs. MMTC Limited (2021) 3 SCC 308 had observed that the Court is not permitted either under Sections 34 or 37 of the Act, 1996 to independently evaluate the merits of the Award, but must confine its authority to the parameters permitted under the Statute. Extreme caution must be observed by the Court under Section 37 of the Act, 1996 and it should be hesitant to disrupt the concurrent conclusions arrived at in the Arbitral Award which is validated by the Court under Section 34 of the Act, 1996.

26. In the aforesaid background, the challenge to the interim Award on the grounds contended by the appellant, needs to be examined.

27. In Gammon India Ltd. (supra), it has been held that powers under Section 31(6) of the Act, 1996 cannot be artificially restricted to exclude from its purview, the power to pass an interim Award on admission. Therefore, to say that one cannot read a power akin to Order XII Rule 6 of CPC, 1908 into Section 31(6), would mitigate against the very objects of the Act.

28. The first ground of challenge is that the alleged admissions mentioned as setoff in Form B submitted before IRP in the proceedings under Insolvency and Bankruptcy Code, 2016 cannot be considered as a determinate amount, unless adjudicated. Moreover, Form B in which the set-off amount is mentioned had been filed before the IRP and not before the learned Arbitrator and cannot be treated as an unequivocal admission in the present proceedings.

29. To understand the controversy, it would be pertinent to first expound what a set off is.

30. “Set-off” is defined in *Black’s Law Dictionary* (7th Edn., 1999) inter alia as a debtor’s right to reduce the amount of a debt by any sum the creditor owes the debtor; the counterbalancing sum owned by the creditor.

In Union of India vs. Karam Chand Thapar & Bros. (Coal Sales) Ltd. and Others, (2004) 3 SCC 504, while referring to concept of set-off under Sub-rule (1) of Rule 6 of Order VIII CPC, 1908 the Apex Court stated thus: -

“What the rule deals with is legal set-off. The claim sought to be set off must be for an ascertained sum of money and legally recoverable by the claimant. What is more significant is that both the parties must fill the same character in respect of the two claims sought to be set off or adjusted. Apart from the rule enacted in Rule 6 above-said, there exists a right to set-off,

called equitable, independently of the provisions of the Code. Such mutual debts and credits or cross-demands, to be available for extinction by way of equitable set-off, must have arisen out of the same transaction or ought to be so connected in their nature and circumstances as to make it inequitable for the court to allow the claim before it and leave the defendant high and dry for the present unless he files a cross-suit of his own. When a plea in the nature of equitable set-off is raised it is not done as of right and nature of equitable set-off is raised it is not done as of right and the discretion lies with the court to entertain and allow such plea or not to do so.”

31. In Amit Kumar Chopra vs. Narain Cold Storage & Allied Industries Pvt. Ltd. & Ors. 2014 (208) DLT 509, the Co-ordinate Bench of this Court observed that from the aforesaid enunciation of law it is quite clear that equitable set-off is different than the legal set-off; that it is independent of the provisions of the Code of Civil Procedure; that the mutual debts and credits or cross-demands must have arisen out of the same transaction or to be connected in the nature of circumstances; that such a plea is raised not as a matter of right; and that it is the discretion of the court to entertain and allow such a plea or not. The concept of equitable set-off is founded on the fundamental principles of equity, justice and good conscience.

32. An equitable set-off is not to be allowed where protracted enquiry is needed for the determination of the sum due, as has been stated in Dobson & Barlow vs. Bengal Spinning & Weaving Co., (1897) 21 Bom 126 and

Girdharilal Chaturbhuj vs. Surajmal Chauthmal Agarwal, AIR 1940 Nag 177.

33. As explained in Cofex Exports Ltd. (supra), set-off exempts a person entitled to it, from making any satisfaction of a claim brought against him, or of so much of the claim as equals the amount which he is entitled to set-off and thus to the extent of his set-off, he is discharged from performance of the obligation in respect of which the claim arises. Also, the interim Award is subject to any adjustments at the time of final adjudication.

34. Therefore, set-off is an admitted amount adjustable from the due being claimed a person. The appellant herein, while giving a detailed statement of claims in Form B before the IRP, has also indicated that the set-off amount has to be paid by it to the respondent. It is a categorical admission by the appellant which requires no further adjudication, and there can be no evidence better than an admission.

35. The other grievance is that the reasoning for allowing the interim Award was that the counter-claim could not be filed by the Operational Creditor/appellant herein before the Arbitrator during the moratorium period. Since pursuant to the directions of learned District judge,

counter-claim has also been filed before the learned Arbitrator, no prejudice would be caused to either party if the claim/counter-claim is adjudicated together for final determination of the disputes.

36. The counter-claim is like an independent Suit filed by the appellant which needs independent adjudication. It may have now been filed before the learned Arbitrator before whom the Claims of the respondent are pending adjudication, but it cannot be overlooked that both the appellant as well as the respondent are required to prove their respective claims by adducing legally admissible evidence. The set-off as discussed above is an admission made by the appellant about the admitted amount that it has to pay to the respondent. Merely because, the set-off finds mention in the counter-claim/documents filed by the appellant, it does not take away the character of the set-off which is an admission of a liability. The argument thus raised, on behalf of the appellant that the set-off cannot be looked into till the adjudication of the claim and the counter-claim, is frivolous and not tenable.

37. A connected argument was raised that the admissions have not been made in these proceedings and cannot form basis of interim Award. The law on judgements on admissions as contained in Order XII Rule 6 CPC,

1908 is couched in widest terms to permit considering the admissions made in the pleadings or “otherwise”. In the present facts, the set-off not only arises in the same business transactions between the parties but also has been made in the proceedings relating to the claims/counter-claims filed by the parties against each other. The appellant’s admission of set-off amount in Form B is not couched with any clarification, explanation or any denial. The admissions are unequivocal and have rightly formed the basis of the interim Award.

38. Interestingly, on one hand the appellant has questioned the directions of the learned District Judge to file the counter-claim before the learned Arbitrator being beyond jurisdiction under Section 34 of the Act, 1996 but at the same time the Counter-Claim has been filed in which the amount of set-off finds no mention. The Counter-Claim has been filed after the interim Award has been made and as already held, it is a liability admittedly payable by the appellant to the respondent and thus the Interim Award for the admitted amount, cannot be faulted.

39. The appellant has also raised an objection that the learned District Judge has adopted a reasoning different from the one adopted by the learned Arbitrator to pass the interim Award. However, this ground of

challenge is completely specious for the simple reason that the adjudication of the Objections under Section 34 of the Act, 1996 by learned District Judge was essentially based on the arguments advanced by both the parties.

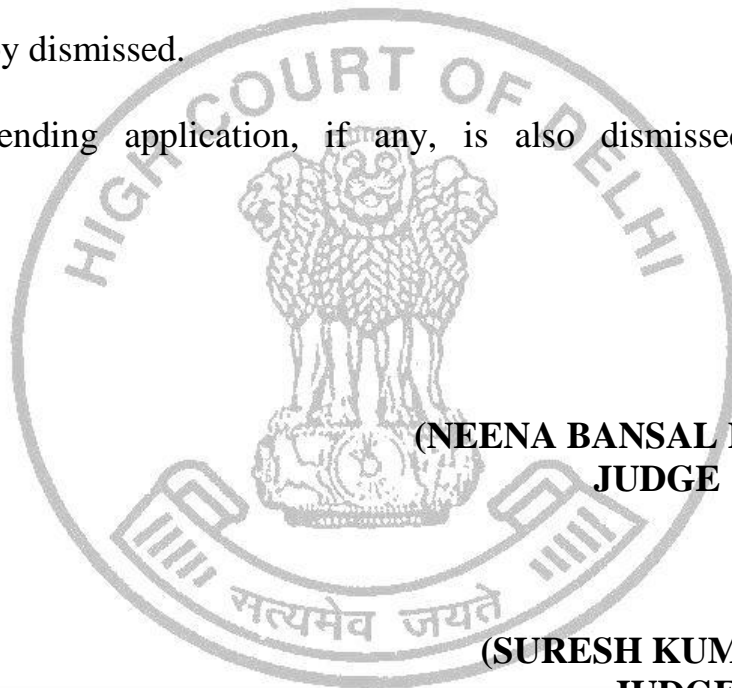
40. The scope of interference under Section 37 of the Act, 1996 is extremely limited. Sections 34 and 37 demand respect to the finality of the arbitral ruling and the party autonomy in having chosen to get their issues resolved through alternate forum of arbitration which would be thwarted if the courts were to accept the challenge to the arbitral rulings on factual issues in a regular manner as reiterated in the recent decision of National Highway Authority of India vs. M. Hakeem (2021) 9 SCC 1. It was observed by the Apex Court that Section 34 has a different methodology and it cannot be considered as a typical Appellate Jurisdiction. The Award, being supported by reasons, does not call for any interference. The Court is not permitted to independently evaluate the merits of the Award, but must confine its authority to the parameters permitted under the statute as held in Anglo American Metallurgical Coal Pty. Ltd. vs. MMTC Ltd. (2021) 3 SCC 308.

41. The learned Arbitrator has judiciously exercised its jurisdiction

under Section 31(6) of the Act, 1996 to give an interim Award on the basis of admission made by the appellant in Form B by way of set-off. There is no illegality, perversity or irrationality in the findings so returned by the learned Arbitrator which have been accepted by the learned District Judge.

42. Accordingly, we do not find any merit in the present appeal and the same is hereby dismissed.

43. The pending application, if any, is also dismissed as being infructuous.



**(NEENA BANSAL KRISHNA)
JUDGE**

**(SURESH KUMAR KAIT)
JUDGE**

FEBRUARY 21, 2023
S.Sharma