

A NATIONAL HIGHWAY AUTHORITY OF INDIA
v.
TRANSSTROY (INDIA) LIMITED
(Civil Appeal No. 6732 of 2021)

B JULY 11, 2022

[M. R. SHAH AND SANJIV KHANNA, JJ.]

Arbitration and Conciliation Act, 1996: s. 23(2A) – Statements of claim and defence – Contract between appellant (NHAI) and the respondent company – Dispute between the parties referred to the arbitrator – Application u/s. 23(2A) by the appellant to permit them to place on record its counter claim – Rejection of, by the tribunal as also the High Court – On appeal, held: When there is a provision for filing the counter claim-set off, which is expressly inserted in s. 23, there was no reason for curtailing the right of the appellant for making the counter claim or set off – If the counter claim made by the appellant is not allowed in the proceedings arising out of the claims made by the respondent, it may lead to parallel proceedings before various fora – It would defeat the object and purpose of permitting to file the counter claim/set off as provided u/s. 23(2A) – Furthermore, the appellant reserved its right to claim the damages and even in the Statement of Defence also claimed such a set off of Rs.1.23 crores – Thus, the High Court on a narrow interpretation of Clause 26 of the Contract erred in rejecting the application – Order passed by the arbitral tribunal and the High Court quashed and set aside.

F **Allowing the appeal, the Court**

HELD: 1.1 It is not open for the Contractor to contend that the counter claim was without following the procedure as required in Clauses 26.1 and 26.2 of the Contract Agreement and, therefore, may not be taken on record. On a true and fair interpretation of Clause 26, failure to resolve the dispute (in the present case, the termination of the Contract by the NHAI), the arbitration proceedings would be maintainable. That does not mean that only a claim and/or counter claim as sought to be contended on behalf of the Contractor now would alone be entertained. [Para 13][966-D-E]

1.2 Both the Arbitral Tribunal as well as the High Court have failed to appreciate the difference between the expressions “claim”, which may be made by one side and “Dispute”, which by its definition has two sides. [Para 13.1][966-E-F]

1.3 Even the Arbitral Tribunal while rejecting the application of the NHAI for extension of time to file the counter claim did not observe and/or rejected the application for extension of time to file the counter claim on the ground that the said counter claim would not be maintainable without following the process as required under Clause 26 of the Contract agreement. [Para 13.2][966-G]

1.4 When the NHAI filed the application under sub-section (2A) of Section 23 of the Arbitration Act, 1996 seeking to place on record its counter claim, Arbitral Tribunal rejected the said application by observing that in the application for permitting the NHAI to place on record the counter claim, the NHAI did not stated anything about having made an attempt for such amicable settlement. However, it is required to be noted that from the very beginning, the NHAI reserved its right to claim the damages and even in the Statement of Defence also claimed such a set off of Rs.1.23 crores and also specifically stated therein that the NHAI reserved its right to file the counter claim. Therefore, on the grounds on which the Arbitral Tribunal rejected the application of NHAI to place on record the counter claim can be said to be contrary to the intent between the parties to resolve the dispute (which was for termination of the Contract by the NHAI) through conciliation first. In the facts and circumstances of the case, by such a narrow interpretation, the Arbitral Tribunal has taken away the valuable right of the NHAI to submit counter claim, which is of a very huge amount thereby negotiating the statutory and contractual rights of the NHAI and paving way for a piecemeal and inchoate adjudication. [Para 13.3][968-F-H; 969-A-C]

1.5 When there is a provision for filing the counter claim-set off, which is expressly inserted in Section 23 of the Arbitration Act, 1996, there is no reason for curtailing the right of the appellant for making the counter claim or set off. If the counter

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- A claim made by the NHAI in the proceedings arising out of the claims made by the Contractor is not allowed, it may lead to parallel proceedings before various fora. While passing the impugned judgment and order, the High Court lost sight of the said aspect, which ought to have been considered while considering the request on behalf of the NHAI to place on record its counter claim. Clauses 26.1 and 26.2 have to be interpreted in a pragmatic and practical manner, as they require that the parties must at first try to settle, resolve and even try conciliation but when the procedure under Clauses 26.1 and 26.2 fails to yield desired result, in the form of settlement within the period specified in Clause 26.2, the Dispute can be resolved through arbitration in terms of Clause 26.3. Once any dispute, difference or controversy is notified under Clause 26.1, the entire subject matter including counter claim/set off would form subject matter of arbitration as “any dispute which is not resolved in Clauses 26.1 and 26.2”. [Para 13.4][969-C-F]

- D 1.6 It is required to be noted that as such there was no delay at all on the part of the NHAI initially praying for extension of time to file the counter claim and/or thereafter to file application under Section 23(2A) permitting it to place on record the counter claim. In the facts and circumstances of the case, not permitting the NHAI to file the counter claim would defeat the object and purpose of permitting to file the counter claim/set off as provided under Section 23(2A) of the Arbitration Act, 1996. Without appreciating the said aspects, the High Court by the impugned judgment and order, and on narrow interpretation of Clause 26 seriously erred in rejecting the application under Section 34/37 of the Arbitration Act, 1996 and confirming the order passed by the Arbitral Tribunal in not permitting the NHAI to file the counter claim. The High Court ought to have appreciated that permitting the NHAI to file the counter claim may avoid multiplicity of proceedings. [Para 13.5][969-G-H; 970-A-B]

- G 1.7 The order passed by the Arbitral Tribunal and the impugned judgment and order passed by the High Court are quashed and set aside. Consequently, the application submitted by NHAI to permit it to file the counter claim is allowed and the NHAI is permitted to file the counter claim, which the Arbitral

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Tribunal to consider alongwith the Statement of Claim submitted by the Contractor and the Statement of Defence of claim submitted by the NHAI on its own merits. [Para 14][970-B-D]

Gujarat State Cooperative Land Development Bank Ltd. v. P.R. Mankad and Ors. (1979) 3 SCC 123 : [1979] 2 SCR 1023; Major (Retd.) Inder Singh Rekhi v. Delhi Development Authority (1988) 2 SCC 338 : [1988] 3 SCR 351; State of Goa v. Praveen Enterprises, (2012) 12 SCC 581 : [2011] 10 SCR 1026; Bharat Petroleum Corporation Limited v. Go Airlines (India) Limited (2019) 10 SCC 250; Silpi Industries Etc. v. Kerala State Road Transport Corporation and Anr. (2021) SCC Online SC 439; Kolkata Metropolitan Development Authority v. Hindustan Construction Co. Ltd., (2017) SCC OnLine Cal 18978; M.K. Shah Engineers & Contractors v. State of MP. (1999) 2 SCC 594 : [1999] 1 SCR 419; Nirman Sindia v. Indal Electromelts Ltd., Coimbatore (1999) SCC OnLine Ker 149.

Case Law Reference

[1979] 2 SCR 1023	referred to	Para 4.2	
[1988] 3 SCR 351	referred to	Para 4.2	E
[2011] 10 SCR 1026	referred to	Para 4.8	
(2019) 10 SCC 250	referred to	Para 4.8	
[1999] 1 SCR 419	referred to	Para 5.5	

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 6732 of 2021.

From the Judgment and Order dated 27.02.2018 of the High Court of Delhi at New Delhi in O.M.P. (COMM) No.459 of 2017.

Ms. Madhavi Diwan, ASG, C. S. Chauhan, A. Venayagam Balan, Advs. for the Appellant.

Nakul Dewan, Sr. Adv., Ms. Neelu Mohan, Ms. Kavita Jha, Surekh Baxy, Parag Rai, Advs. for the Respondent.

A The Judgment of the Court was delivered by

M. R. SHAH, J.

B 1. Feeling aggrieved and dissatisfied with the impugned judgment
and order passed by the High Court of Delhi in OMP No.459 of 2017 by
which the High Court has dismissed the said petition under Section 34 of
the Arbitration and Conciliation Act, 1996 (hereinafter referred to as
“the Arbitration Act, 1996”) in which the appellant – National Highway
Authority of India (hereinafter referred to as “NHAI”) prayed to set
aside the Arbitral Award dated 15.09.2017 and also the order passed by
the Arbitral Tribunal not entertaining and/or considering the counter claim
C filed by the NHAI, the original petitioner – NHAI has preferred the
present appeal.

2. The facts leading to the present appeal and the case on behalf
of the appellant – NHAI are as under:-

D **2.1** That the NHAI and the respondent entered into a contract.
An Engineering Procurement and Construction (EPC) Agreement
(hereinafter referred to as “Contract”) was executed between the parties
on 13.11.2014 in respect of “improvement/augmentation of two laning
with paved shoulders from km.94/000 to km.174/000 (design chainage
from km.94/000 to km.174/000) of Karaikudi-Ramanathapuram Section
E of National Highway No. 210 including 500m on SH-35 Madurai Road
(near Devakottai Rasta Railway Station) in the State of Tamil Nadu on
EPC mode (total design length 80.00kms) under NHDP PHASE-III”.

F **2.2** According to the NHAI, the respondent/Contractor was in
continuous breach of specific obligations under the Contract for which a
cure period notice was issued by the NHAI under Clause 23.1.1 of the
Contract as far as back on 29.09.2015 calling upon the Contractor to
cure the defaults within 60 days. The Contractor failed to cure the defects
pointed out by the NHAI, thus, a notice of intention to terminate the
Contract was issued by the NHAI on 12.04.2016 under Clause 23.1.2.
The respondent/Contractor sent its reply dated 14.04.2016 to the NHAI’s
G notice of intention to terminate the contract. Having found the reply
totally unsatisfactory, the NHAI issued a termination notice dated
22.07.2016 under Clause 23.1.2 of the Contract. It is the case on behalf
of the appellant – NHAI that the NHAI specifically stated in the
termination notice that “the same is without prejudice to the Authority’s
H right to claim damages for the Contractor’s failure to comply with the

unambiguous obligations casted upon it under the Contract and/or to realize any dues, losses and damages whatsoever under the Contract or under applicable laws, as the case may be”. A

2.3 On receipt of the termination notice, the respondent/Contractor addressed a letter to the NHAI on 02.01.2017 to refer certain disputes for amicable settlement under Clause 26.2 of the Contract. That thereafter, the Contractor invoked the arbitration clause (Clause 26 of the Contract) vide letter dated 09.02.2017 and nominated its Arbitrator and requested the NHAI to nominate its Arbitrator so that the Presiding Arbitrator may be appointed. The NHAI nominated its arbitrator by letter dated 10.03.2017 which was followed by the appointment of the Presiding Arbitrator. Accordingly, the Arbitral Tribunal came to be constituted. The Contractor filed the Statement of Claim on 15.05.2017. The NHAI filed its statement of defence on 11.07.2017. It is the case on behalf of the NHAI that both in the termination notice dated 22.07.2016 as well as in the Statement of Defence dated 11.07.2017, the NHAI reserved its right to claim damages and stated that it would file its counter claim separately. B
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2.4 On 13.07.2017, i.e., after two days of filing the Statement of Defence by the NHAI, the NHAI sent a letter to the Arbitral Tribunal seeking extension of time for filing the counter claim. Vide email dated 18.07.2017 the Arbitral Tribunal rejected the NHAI’s request seeking extension of time for filing the counter claim and stated that no application has been filed by the NHAI for filing counter claim. It appears that thereafter the NHAI moved an application before the Arbitral Tribunal under Section 23(2A) of the Arbitration Act to place its counter claim on record. It appears that on the very same day, the NHAI filed its counter claim before the Arbitral Tribunal. The Arbitral Tribunal rejected the NHAI’s application permitting it to place on record the counter claim vide order dated 15.09.2017, essentially on the ground that the procedure under Clauses 26.1 and 26.2 had not been followed by the NHAI and therefore, the counter claim was beyond the scope of arbitration agreement and adjudication of the said dispute is not within the jurisdiction of the Arbitral Tribunal. E
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2.5 Feeling aggrieved and dissatisfied with the order passed by the Arbitral Tribunal dated 15.09.2017 dismissing the application filed by the NHAI seeking permission to place on record the counter claim and holding that the dispute raised by the NHAI in the counter claim is not H

A within the scope of arbitration agreement and that the dispute sought to be filed is contractually not arbitrable and the adjudication of the said dispute is not within the jurisdiction of the Arbitral Tribunal, NHAI preferred the appeal under Section 34 of the Arbitration Act, 1996 before the High Court of Delhi.

B **2.6** Before the High Court, an objection was raised on behalf of the Contractor on maintainability of the application under Section 34 of the Arbitration Act, 1996. However, treating the order dated 15.09.2017 passed under Section 16(2) of the Arbitration Act, 1996, the High Court has treated the proceedings before it as one under Section 37(2) of the Arbitration Act, 1996 while deciding on the admissibility of the counter claim and thereafter has decided the same on merits.

C **2.7** By the impugned judgment and order, the High Court has dismissed the said application and has confirmed the order passed by the Arbitral Tribunal dated 15.09.2017 rejecting the application submitted by NHAI to take the counter claim on record.

D **2.8** Feeling aggrieved and dissatisfied with the impugned judgment and order passed by the High Court, the NHAI has preferred the present appeal.

E **3.** Ms. Madhavi Diwan, learned ASG has appeared on behalf of the NHAI and Shri Nakul Dewan, learned Senior Advocate has appeared on behalf of the respondent – Contractor.

F **4.** Ms. Madhavi Diwan, learned ASG appearing on behalf of the NHAI has vehemently submitted that in the facts and circumstances of the case, the High Court has committed a grave/serious error in confirming the order passed by the Arbitral Tribunal not taking on record the counter claim filed by the NHAI.

G **4.1** it is further submitted by Ms. Diwan, learned ASG that, both, the Arbitral Tribunal as well as the High Court have failed to appreciate that the counter claim was based on common/overlapping cause of action. It is submitted that the arbitration invoked by the Contractor arose out of the very termination notice which had been issued by the NHAI. Therefore, the foundation of the Contractor's case before the Arbitral Tribunal is the validity of such termination. Therefore, there was no question of seeking to hair split the dispute between the parties. It would lead to unnecessary multiplicity of proceedings and needless cost and

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inconvenience when the evidence itself is also common because the dispute arises out of the same transaction. A

4.2 It is further submitted by Ms. Diwan, learned ASG that as such Clause 26 can be invoked by either party. It is submitted that Clause 26 of the Contract is self-explanatory, where it refers to ‘any dispute’, difference or controversy being required to be attempted to be amicably resolved in accordance with the conciliation procedure under Clause 26.2. It is submitted that the provision requires the same to be notified in writing by either party. Likewise, Clause 26.2 states that either party may call upon the Authority’s Engineer or such other person as the parties may mutually agree upon to mediate and arrive at an amicable settlement. It is submitted that the reason and the rationale behind permitting either party to invoke Clause 26.1 is that by its very definition ‘a dispute’ is two sided. On interpretation of the word ‘dispute’, reliance is placed upon the decisions of this Court in the case of **Gujarat State Cooperative Land Development Bank Ltd. Vs. P.R. Mankad and Ors., (1979) 3 SCC 123** (para22) and **Major (Retd.) Inder Singh Rekhi VS. Delhi Development Authority, (1988) 2 SCC 338** (para 4). B C D

4.3 Relying upon the aforesaid two decisions, it is further submitted by Ms. Madhavi Diwan, learned ASG that in the present case, the word “Dispute” has been used by the Contractor itself in its notice dated 02.01.2017 as well as in his letter dated 09.02.2017 whereby the Contractor itself had referred the Termination Notice as an unilateral decision from which a “Dispute” has arisen. It is submitted that thus, the Dispute in the present case is with regard to the termination notice dated 22.07.2016 issued by the NHAI. It is submitted that therefore, it would be a travesty of process to interpret “Dispute” as only allowing for the claim made on behalf of the Contractor to be submitted to the process contemplated under Clause 26. It is submitted that the Arbitral Tribunal and the High Court have failed to appreciate the difference between the expressions ‘claim’ which may be made by one side and ‘Dispute’ which by its definition has two sides. It is submitted that the language of Clause 26 itself contemplates that “either party” to the dispute may invoke this procedure. It is submitted that therefore there can be no question of duplication of very same process which has been invoked beforehand and eventually culminated in arbitration process. It is submitted that the second round under Clause 26 would in any event be an exercise in futility in as much as very same issue would have been brought up namely E F G

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- A whether termination of contract was lawful or not, which issue by then was already pending before the Arbitral Tribunal.

4.4 It is further submitted that the Arbitral Tribunal as well as the High Court have failed to appreciate that it was the NHAI who was compelled to terminate the contract after providing sufficient opportunities to the Contractor to cure the defects. The NHAI specifically reserved its right in the termination notice itself to claim damages which is a natural consequence of termination for Contractor's failure to comply with its obligations. It is submitted that therefore the contention on behalf of the Contractor that the counter claim was by surprise or by way of counterblast be stated to be rejected.

4.5 It is submitted that even it cannot be said that NHAI by submitting the counter claim has bypassed the procedure which the parties had agreed. It is submitted that there can be no question of bypassing the procedure when that stage has already passed in the present case. It is submitted that Clause 26 does not contemplate repeated invocation of same procedure when there is an overlapping cause of action and the repetition of process would be completely meaningless.

4.6 It is submitted that as per the settled position of law, rules or procedures are the handmaids and not the mistress of justice. The procedural provisions cannot be interpreted in a hyper-technical manner to waste the time and resources of parties contrary to the letter and spirit of the Arbitration Act.

4.7 It is vehemently submitted by Ms. Diwan, learned ASG that in the present case not taking on record the counter claim filed by the NHAI, the Arbitral Tribunal and the High Court both have lost sight of the very object and purpose of Section 23(2A) which is meant to provide convenience to the parties in being able to file the entirety of their claim/counter claim, etc. before the Arbitral Tribunal. It is submitted that therefore, there was absolutely no reason for the High Court to have excluded the counter claim which was sought to be filed before the Arbitral Tribunal by the NHAI within two days of filing of its Statement of Defense. It is submitted that Section 23 has been amended pursuant to the recommendation of the Law Commission of India in its Report No. 246 "to ensure that counter claims and set off can be adjudicated upon by an arbitrator without seeking a separate/new reference by the respondent so long as it falls within the scope of the arbitration agreement,

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in order to ensure final settlement of disputes between parties and prevent multiplicity of litigation”. A

4.8 Making above submissions and relying upon the decisions of this Court in the case of **State of Goa Vs. Praveen Enterprises, (2012) 12 SCC 581; Bharat Petroleum Corporation Limited Vs. Go Airlines (India) Limited, (2019) 10 SCC 250; Silpi Industries Etc. Vs. Kerala State Road Transport Corporation and Anr., 2021 SCC Online SC 439** and the decision of the Calcutta High Court in the case of **Kolkata Metropolitan Development Authority Vs. Hindustan Construction Co. Ltd., 2017 SCC OnLine Cal 18978** (against which Special Leave Petition (C) Nos. 18443-18444 of 2018 were filed and the same were dismissed by this Court by order dated 23.07.2018), it is prayed to allow the present appeal and to direct the Arbitral Tribunal to take on record the counter claim filed by the NHAI and adjudicate the same in accordance with law. B C

5. Present appeal is vehemently opposed by Shri Nakul Dewan, learned Senior Advocate appearing on behalf of the respondent – Contractor. D

5.1 Shri Nakul Dewan, learned Senior Advocate appearing on behalf of the respondent – Contractor has made following broad submissions in support of his prayer to dismiss the present appeal. He has submitted as under:- E

- (i) Clause 26 of the EPC Contract mandatorily required the parties to attempt to amicably settle the Disputes (identified and crystallised prior to the reference) as a pre-condition to the invocation of arbitration. That has not been done by the appellant – NHAI with respect to its counter claim. F
- (ii) The term “Disputes” defined and set out in Clause 26.1.1. has to be strictly construed to mean those disputes which were identified by any party and referred for conciliation under Clause 26.1.1 read with Clause 26.2. No such identification had been done by the appellant - NHAI for its counter claim, meaning thereby that they cannot be raised by the appellant - NHAI. G
- (iii) The mere reservation of rights would not entitle either party to bypass the contractually agreed mechanism under Clause 26 of the EPC Contract. H

- A (iv) Section 23(2A) of the Act does not permit a counter claim to be raised in a manner which is inconsistent with the agreement of the parties.

5.2 Elaborating above submissions, it is submitted by Shri Nakul Dewan, learned Senior Advocate appearing on behalf of the respondent – Contractor that Clause 26 of the EPC Contract is clear and unambiguous. It lays down a two-step process prior to the invocation of the arbitration process. It is submitted that the EPC Contract does not contemplate parties directly raising claims by directly resorting to arbitration without going through the steps set out in Clause 26. It is submitted that Step 1 can be said to be “Notification of Disputes”. In the event that a “dispute, difference, or controversy” has arisen between the parties, then it has to be “notified in writing” to the other party. This notification can be done by any party which has a dispute. Such notification then gives rise to a “Dispute” defined and contemplated under Clause 26.1.1 of the EPC Contract

- D **5.3** It is submitted that Step 2 is with respect to “Resolution by amicable settlement”. Under the Step 2, the parties are then required to attempt to amicably resolve the “Dispute” in accordance with the conciliation procedure set out at Clause 26.2. The mandatory requirement of conciliation is evident by the use of the word “shall” in Clause 26.1.1.
- E It is submitted that as per Clause 26.2, the dispute is required to be mediated by NHAI’s Engineer or such other person as mutually decided, which is called the Conciliator under the EPC Contract. Failing such mediation or without the intervention of the Conciliator, either party may refer the dispute to NHAI’s Chairman for amicable settlement, following the time-bound procedure set out in Clause 26.2.

- F **5.4** It is submitted that Step 3 is “Invocation of arbitration”. It is submitted that it is only on the failure to resolve the dispute amicably that the Dispute notified under Clause 26.1.1. is thereafter referred to arbitration. Clause 26.3.1 clearly lays down that any “Dispute, which is not resolved amicably as provided under Clause 26.1 and Clause 26.2” shall be finally referred to arbitration. It is submitted that therefore only those Disputes which are not resolved after Steps 1, 2 and 3 alone, can be the subject matter of dispute before the Arbitral Tribunal.

- G **5.5** It is submitted that any interpretation permitting the parties to bypass the mechanism laid down in the EPC Contract, unless waived,
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would amount to a rewriting of the contract. It is submitted that as observed and held by this Hon'ble Court in the case of **M.K. Shah Engineers & Contractors Vs. State of MP. (1999) 2 SCC 594**, a pre-arbitral requirement is an essential facet of the arbitration clause. Reliance is also placed on the decision of the Kerala High Court in the case of **Nirman Sindia v. Indal Electromelts Ltd., Coimbatore 1999 SCC OnLine Ker 149**. It is submitted that in the aforesaid decision, the Hon'ble High Court of Kerala has held that "when the parties to a contract agree to any special mode for resolution of the disputes arising out of the agreement and they are bound to comply with the mode prescribed under the agreement. Without resorting to the first step provided for the resolution of the dispute in the agreement they cannot jump to the second step or to the final step to settle the disputes between the parties".

5.6 It is further submitted by Shri Nakul Dewan, learned Senior Advocate appearing on behalf of the respondent – Contractor that the mandatory and enforceable nature of contractually stipulated pre-conditions to arbitration, which are aimed at dispute resolution through mediation or negotiations, have also been held to be enforceable internationally.

5.7 It is submitted that therefore as Clause 26 of the EPC Contract is mandatory in nature, no claim should be allowed to be introduced in a manner contrary to the contractual mechanism may be by way of counter claim.

5.8 It is further submitted by Shri Nakul Dewan, learned Senior Advocate appearing on behalf of the respondent – Contractor that in the present case the parties have contractually defined and limited the term "Dispute" at Clause 26.1.1 of the EPC Contract to mean any dispute, difference, or controversy "notified in writing by either Party to the other Party". It is submitted that Clause 1.1 of the EPC Contract further sets out that "words and expressions beginning with capital letters and defined in this Agreement ... shall, unless the context otherwise requires, have the meaning ascribed thereto herein ...

5.9 It is submitted that therefore having contractually agreed to only define notified disputes as "Disputes" and further restricting the reference of only such "Disputes" to arbitration under Clause 26.3 as only those which are notified by parties under Clause 26.1 and referred

A to conciliation under Clause 26.2, no other interpretation, contrary to the written contract should be taken. That is because Courts give effect to the contractual bargain of the parties unless such bargain is contrary to statute or against public policy, neither of which exception has or can be pleaded in this case.

B **5.10** It is submitted that the submission on behalf of the NHAI that the counter claims arise out of the unlawful termination of the EPC Contract, and that it falls within the definition of “Dispute” and that the term “Dispute” ought to be widely construed to include the counter claims that may arise out of the termination of the EPC Contract is to be rejected outright. It is submitted that the use of the words “any Dispute” used in
C Clause 26.3.1 also ought to be accordingly construed to mean only those matters which have been notified by the parties for amicable settlement under Clause 26.1.

5.11 Now, so far as the assertion on behalf of the appellant – NHAI that having reserved its rights to raise counter claim at the stage
D of termination as well as of filing its Statement of Defence, it is entitled to raise the counter claim and the submission that permitting the NHAI to file the counter claim would avoid multiplicity, it is submitted that the said assertion is without any basis. It is submitted that the mandatory nature of Clause 26 which required a party to crystallise and notify its
E Dispute to the other party is a clause which seeks to ensure that only those claims that are notified get adjudicated.

5.12 It is submitted that if the NHAI had any genuine claim, then it ought to have notified the respondent - Contractor in accordance with Clause 26.1.1 of the EPC Contract. The NHAI could have done so
F even after the Contractor sought to refer the Disputes to arbitration where it ought to have sought the adjudication of its counter claims. However, it did not do so and instead, expressly sought to refer the “disputes under reference raised by the contractor”. Thus, waiving its rights to refer any counter claims to arbitration. It is submitted that that being the case, the NHAI should not be allowed to introduce a counter
G claim of INR 208 crores through a circuitous interpretation of Section 23(2A) of the Act.

5.13 Now, so far as reliance placed upon Section 23(2A) of the Act relied upon on behalf of the NHAI, it is submitted that though Section 23(2A) of the Act recognises the right of a respondent to raise counter
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claims, the language of the statute is clear. In terms of Section 23(2A), the Tribunal has jurisdiction over such counter claims, “if such counter claim or set-off falls within the scope of the arbitration agreement.” A

5.13.1 It is submitted that in a given case the scope of the arbitration agreement, as set out under Section 23(2A) of the Act, must be ascertained by a conjoint reading of Sections 2(1)(b), 7 and 21 of the Act read along with the arbitration clause. It is submitted that on a conjoint reading of the aforesaid provisions of the Arbitration Act, 1996, it is apparent that parties are fully entitled to choose which disputes get referred to arbitration. The same is consistent with the recognition of the party autonomy. It is submitted that in the present case, the parties have chosen through the mechanism set out under Clause 26.1.1 read with Clause 26.3.1 that only those disputes notified by one party to the other and first categorised under the head of a Dispute which cannot be “resolved amicably” under Clause 26.2 can be referred to arbitration. It is submitted that therefore a counter claim directly brought before the Tribunal without having been categorised as a “Dispute” in terms of Clause 26.1 and that too by bypassing the mandatory pre-conditions agreed between the parties would fall outside the scope of the arbitration agreement as specified under Section 23(2A) and hence beyond the jurisdiction of the Tribunal. B C D

5.14 Making above submissions, it is vehemently submitted that in the present case, both the Arbitral Tribunal as well as the Hon’ble High Court have not committed any error in not permitting the NHAI to file the counter claim, which was filed straightaway before the Arbitral Tribunal without following the procedure as required under Clause 26. Therefore, it is prayed to dismiss the present appeal. E

6. We have heard the learned counsel for the respective parties at length. F

7. The short question, which is posed for the consideration of this Court is :

Whether in the facts and circumstances of the case, the High Court as well as the Arbitral Tribunal have committed any error in rejecting the application submitted by NHAI under Section 23(2A) of the Arbitration Act, 1996 not permitting the NHAI to take on record the counter claim? G

8. At the outset, it is required to be noted that in the present case, the NHAI submitted the Statement of Defence on 11.07.2017 in which H

- A the NHAI reserved its right to claim damages and stated that it would file its counter claim separately and after two days only, i.e., on 13.07.2017, sent a letter to the Arbitral Tribunal seeking extension of time for filing the counter claim, which came to be rejected by the Arbitral Tribunal vide e-mail on 18.07.2017. That thereafter, immediately the NHAI moved an application before the Arbitral Tribunal under Section 23(2A) of the Arbitration Act, 1996 to place its counter claim on record. In this factual background, the aforesaid issue/question posed for consideration of this Court is required to be considered.

- C 9. While answering the aforesaid question, the relevant clauses of the Contract between the parties and the relevant provisions of the Arbitration Act, 1996 are required to be referred to.

10. Clause 26 of the Contract is with respect to the dispute resolution. Clause 26.1 to Clause 26.3.1, which are relevant for our purpose are as under:-

- D “26.1 Dispute Resolution

- E 26.1.1 Any dispute, difference or controversy of whatever nature howsoever arising under or out of or in relation to this Agreement (including its interpretation) between the Parties, and so notified in writing by either Party to the other Party (the “Dispute”) shall, in the first instance, be attempted to be resolved amicably in accordance with the conciliation procedure set forth in Clause 26.2.

- F 26.1.2 The Parties agree to use their best efforts for resolving all Disputes arising under or in respect of this Agreement promptly, equitably and in good faith, and further agree to provide each other with reasonable access during normal business hours to all non-privileged records, information and data pertaining to any Dispute.

- G 26.2 Conciliation
In the event of any Dispute between the Parties, either Party may call upon the Authority’s Engineer, or such other person as the Parties may mutually agree upon (the “Conciliator”) to mediate and assist the Parties in arriving at an amicable settlement thereof. Failing mediation by the Conciliator or without the intervention

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of the Conciliator, either Party may require such Dispute to be referred to the Chairman of the Authority and the Chairman of the Board of Directors of the Contractor for amicable settlement, and upon such reference, the said persons shall meet no later than 7 (seven) business days from the date of reference to discuss and attempt to amicably resolve the Dispute. If such meeting does not take place within the 7 (seven) business day period or the Dispute is not amicably settled within 15 (fifteen) days of the meeting or the Dispute is not resolved as evidenced by the signing of written terms of settlement within 30 (thirty) days of the notice in writing referred to in Clause 26.1.1 or such longer period as may be mutually agreed by the Parties, either Party may refer the Dispute to arbitration in accordance with the provisions of Clause 26.3.

- 26.3 Arbitration
- 26.3. “Any Dispute, which is not resolved amicably as provided in clause 26.1 & 26.2 shall be finally settled by arbitration as set forth below:
- i) The Dispute shall be finally settled by arbitration in accordance with the Arbitration & Conciliation Act, 1996, or any statutory amendment thereof. The Arbitral tribunal shall consist of 3 Arbitrators, one each to be appointed by NHAI and the Contractor. The third Arbitrator shall be chosen by the two Arbitrators so appointed by the Parties and shall act as Presiding Arbitrator. In case of failure of the two Arbitrators, appointed by the parties to reach upon a consensus within period of 30 days from the appointment of the Arbitrator appointed subsequently, the Presiding Arbitrator shall be appointed by the Chairman of the Executive Committee of the Indian Roads Congress.
- ii) Neither party shall be limited in the proceedings before such Tribunal to the evidence or arguments before the other party /Independent consultant.

- A iii) Arbitration may be commenced during or after the Contract Period, provided that the obligations of NHAI and the Contractor shall not be altered by reason of the arbitration being conducted during the Contract Period.
- B iv) If one of the parties fails to appoint its Arbitrator in pursuance of Sub-Clause (1) above, within 30 days after receipt of the notice of the appointment of its Arbitrator by the other party, then the Chairman of the Executive Committee of the Indian Roads Congress, shall appoint the Arbitrator. A certified copy of the order of the Chairman of the Executive Committee of the Indian Roads Congress making such an appointment shall be furnished to each of the parties.
- C v) Arbitration proceedings shall be held at Delhi, India, and the language of the Arbitration Proceedings and that of all documents and communications between the parties shall be English.
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XXXXXXXXXXXXX”

11. Section 23 of the Arbitration Act, 1996 as amended by Act No. 3 of 2016 is as under:-

- E “**23. Statements of claim and defence.**—(1) Within the period of time agreed upon by the parties or determined by the arbitral tribunal, the claimant shall state the facts supporting his claim, the points at issue and the relief or remedy sought, and the respondent shall state his defence in respect of these particulars, unless the parties have otherwise agreed as to the required elements of those statements.
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(2) The parties may submit with their statements all documents they consider to be relevant or may add a reference to the documents or other evidence they will submit.

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

- H (3) Unless otherwise agreed by the parties, either party may amend or supplement his claim or defence during the course

of the arbitral proceedings, unless the arbitral tribunal considers it inappropriate to allow the amendment or supplement having regard to the delay in making it. A

(4) The statement of claim and defence under this section shall be completed within a period of six months from the date the arbitrator or all the arbitrators, as the case may be, received notice, in writing of their appointment.” B

12. Thus, from the aforesaid, it may be seen that Clause 26 – Dispute Resolution Clause, i.e., Clause 26.1 and Clause 26.2, are in the nature of conciliation. Both the parties are given opportunity to resolve the dispute amicably and efforts are to be made through conciliation to resolve the “Dispute” and thereafter the “Dispute”, which is not resolved amicably, shall have to be finally settled by the arbitration. The words used are “any dispute, difference or controversy of whatever nature howsoever arising under or out of or in relation to this agreement between the parties.....”. It is required to be noted that in the present case, the cause for the dispute between the parties was the termination of the contract by the NHAI. As far as the said dispute of termination of notice was required to be resolved amicably as per the procedure prescribed under Clauses 26.1 and 26.2 of the Contract Agreement. It may be true that in a given case, the “Dispute” may include the claims and/or counter claims, but, at the same time, the main dispute can be said to be termination of the contract, which as observed hereinabove was required to be resolved through conciliation after following the procedure as above. In the present case, the communication dated 02.01.2017 addressed by the Contractor to the Chairman, NHAI, it was stated as under:- C
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“Due to this unilateral action of the Authority a Dispute has arisen between the parties to the agreement. As the dispute has already arisen, it is required the dispute to be referred to the Chairman of the Authority in accordance with the Clause 26.2 of the Contract Agreement for an amicable settlement.” F

12.1 Even in the notice invoking arbitration dated 09.02.2017, it is stated as under:- G

“However the Authority has terminated the Contract Agreement and invoked the performance Bank Guarantee of Rs.21.00 Cr.

Due to this unilateral and illegal action of the Authority by a Dispute has arisen between the parties to the agreement. H

A In accordance with the Clause 26.3.1 of the Contract Agreement
 “Any dispute which is not resolved amicably as provided in Clause
 26.1 & 26.2 shall be finally settled by arbitration as set forth below”

B i) The Dispute shall be finally settled by arbitration in accordance
 with the Arbitration & Conciliation Act, 1996, or any statutory
 amendment thereof. The Arbitral tribunal shall consist of 3
 Arbitrators, one each to be appointed by NHAI and the
 Contractor. The third Arbitrator shall be chosen by the two
 Arbitrators so appointed by the Parties and shall act as
 Presiding Arbitrator.

C ii) Accordingly we are nominating Shri D Sree Rama Murthy,
 as our arbitrator, whose consent is enclosed herewith. We
 humbly request you to nominate your arbitrator so that the
 third arbitrator shall be appointed by the two arbitrators so
 appointed by the Parties and shall act as Presiding Arbitrator.”

D 13. Therefore, thereafter, it is not open for the Contractor to
 contend that the counter claim was without following the procedure as
 required in Clauses 26.1 and 26.2 and, therefore, may not be taken on
 record. On a true and fair interpretation of Clause 26, failure to resolve
 the dispute (in the present case, the termination of the Contract by the
 NHAI), the arbitration proceedings would be maintainable. That does
 E not mean that only a claim and/or counter claim as sought to be contended
 on behalf of the Contractor now would alone be entertained.

F **13.1** Both the Arbitral Tribunal as well as the High Court have
 failed to appreciate the difference between the expressions “claim”,
 which may be made by one side and “Dispute”, which by its definition
 has two sides.

G **13.2** At this stage, it is required to be noted that even the Arbitral
 Tribunal while rejecting the application of the NHAI for extension of
 time to file the counter claim did not observe and/or rejected the
 application for extension of time to file the counter claim on the ground
 that the said counter claim would not be maintainable without following
 the process as required under Clause 26 of the Contract agreement.
 The order dated 18.07.2017 passed by the Arbitral Tribunal rejecting the
 application submitted by NHAI for extension of time to file the counter
 claim is as under:-

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“This has reference to the respondent’s letter dated July 13, 2017 making request for extending the time by 4 weeks for filing of the counterclaims. In this connection the AT has to remind the respondent that at the time of first and preliminary meeting held on 20.04.2017, while fixing the schedule for filing of pleadings by the parties, the AT had specifically brought the fact to the notice of both the parties including the respondent, vide para 12.0 of the minutes of the said meeting, that the present arbitral matter is covered under the Act of 1996 as amended in year 2015 and therefore the adjudication is to be completed within one year and therefore the directions given by the AT shall be complied with within the time frame indicated without being required to seek any postponement or extension of time. Further the last date for filing of the SOD was determined in consultation with the respondent to be on or before 30.06.2017. The SOD was however filed by the respondent on 11.07.2017 after seeking an extension of time for 2 weeks. The AT had granted the said extension with a view to give the respondent a reasonable opportunity to present its case. Now the respondent is seeking an extension of time for filing of the counterclaims.

It may be mentioned here that the claimant has, vide its email dated 18.07.2017, objected to grant of any extension of time for filing of the counterclaims for the reasons stated therein,

The AT has given thought to request made by the respondent taking into consideration the procedure and schedule of filing of pleadings agreed upon by both the parties as detailed in the Proceedings of the AT dated 20.04.2017 and the Act of 1996 as amended in year 2015.

The AT observes that sub-sections 23(2) and 23(2A) of the amended Act of 1996, read together provide that the respondent may, in support of his case, also submit a counterclaim or plead a set-off, along with its Statement of Defence for adjudication by the AT. The AT observes that the respondent has pleaded a set-off of Rs. 1.23 crores vide its Statement of Defence; while as regards the counterclaims, it has been stated therein that the respondent reserves its right to file the counterclaims. The respondent has not stated any applicable law in respect of reserving such right.

- A In the above background, the AT observes that (i) during the proceedings the procedure and schedule for filing the pleadings were determined by the AT as agreed to by both the parties; that there is no mention therein for filing of the counterclaims by the respondent and (ii) the Statement of Defence has already been
- B filed by the respondent, with set-off and without any counterclaim as per the procedure agreed to by and between the parties, except that the respondent has sue moto reserved its right to file counterclaim at a later date. Thereafter there is no application by the respondent for filing of any counterclaim. In the above
- C circumstances, there is no question of having any date determined by the AT or agreed upon by the parties for filing the counterclaim by the respondent, and if there is no date fixed or agreed upon for filing of the counterclaims, the question of its extension does not arise. Therefore, the AT orders that the request for an extension of time for filing of the counterclaim made by the respondent is not in accordance with applicable law and is irrelevant in view of
- D the factual circumstances as above.

- E In view of the delay in filing of the SOD by the respondent, the claimant shall file its rejoinder thereon, if any, on or before 05.08.2017 and the statement of admission and denial of documents shall be filed by the parties on or before 11.08.2017 i.e. the date of the next meeting of the AT.

The above decision of the AT does not preclude the respondent from having another legal remedy in respect of its claims.

- F The above Order is issued by the Presiding Arbitrator in consultation with and on behalf of the AT.”

- G **13.3** However, thereafter, when the NHAI filed the application under sub-section (2A) of Section 23 of the Arbitration Act, 1996 seeking to place on record its counter claim, by order dated 15.09.2017, the Arbitral Tribunal rejected the said application by observing that in the application for permitting the NHAI to place on record the counter claim, the NHAI has not stated anything about having made an attempt for such amicable settlement. However, it is required to be noted that from the very beginning, the NHAI reserved its right to claim the damages and even in the Statement of Defence also claimed such a set off of Rs.1.23 crores and also specifically stated therein that the NHAI reserved
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its right to file the counter claim. Therefore, on the grounds on which the Arbitral Tribunal had rejected the application of NHAI to place on record the counter claim can be said to be contrary to the intent between the parties to resolve the dispute (which was for termination of the Contract by the NHAI) through conciliation first. In the facts and circumstances of the case, by such a narrow interpretation, the Arbitral Tribunal has taken away the valuable right of the NHAI to submit counter claim, which is of a very huge amount thereby negotiating the statutory and contractual rights of the NHAI and paving way for a piecemeal and inchoate adjudication.

13.4 When there is a provision for filing the counter claim – set off, which is expressly inserted in Section 23 of the Arbitration Act, 1996, there is no reason for curtailing the right of the appellant for making the counter claim or set off. If we do not allow the counter claim made by the NHAI in the proceedings arising out of the claims made by the Contractor, it may lead to parallel proceedings before various fora. While passing the impugned judgment and order, the High Court has lost sight of the aforesaid aspect, which ought to have been considered while considering the request on behalf of the NHAI to place on record its counter claim. Clauses 26.1 and 26.2 have to be interpreted in a pragmatic and practical manner, as they require that the parties must at first try to settle, resolve and even try conciliation but when the procedure under Clauses 26.1 and 26.2 fails to yield desired result, in the form of settlement within the period specified in Clause 26.2, the Dispute can be resolved through arbitration in terms of Clause 26.3. Once any dispute, difference or controversy is notified under Clause 26.1, the entire subject matter including counter claim/set off would form subject matter of arbitration as “any dispute which is not resolved in Clauses 26.1 and 26.2”.

13.5 At this stage, it is required to be noted that as such there was no delay at all on the part of the NHAI initially praying for extension of time to file the counter claim and/or thereafter to file application under Section 23(2A) permitting it to place on record the counter claim. In the facts and circumstances of the case, we are of the opinion that not permitting the NHAI to file the counter claim would defeat the object and purpose of permitting to file the counter claim/set off as provided under Section 23(2A) of the Arbitration Act, 1996. Without appreciating the aforesaid aspects, the High Court has by the impugned judgment

- A and order, and on narrow interpretation of Clause 26 has seriously erred in rejecting the application under Section 34/37 of the Arbitration Act, 1996 and confirming the order passed by the Arbitral Tribunal in not permitting the NHAI to file the counter claim. The High Court ought to have appreciated that permitting the NHAI to file the counter claim may avoid multiplicity of proceedings.
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14. In view of the above and for the reasons stated above, the order passed by the Arbitral Tribunal dated 15.09.2017 and the impugned judgment and order passed by the High Court deserve to be quashed and set aside and are accordingly quashed and set aside. Consequently, the application submitted by NHAI to permit it to file the counter claim is hereby allowed and the NHAI is permitted to file the counter claim, which the Arbitral Tribunal to consider alongwith the Statement of Claim submitted by the Contractor and the Statement of Defence of claim submitted by the NHAI on its own merits. In view of the delay occasioned by the impugned orders, we direct that the period between 18.07.2017 till 11.07.2022 shall be excluded for computing the period for passing of the award under Section 29A of the Arbitration Act, 1996.
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Present Appeal is accordingly Allowed. However, in the facts and circumstances of the case, there shall be no order as to costs.

Pending applications, if any also stand disposed of.

Nidhi Jain

Appeal allowed.