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

% ***Reserved on: 28th February, 2024***
Pronounced on: 31st May, 2024

\+ **O.M.P. (COMM) 104/2024 & I.A. 4567-4568/2024**

VIRTUAL WIRE TECHNOLOGIES PVT. LTD.
At B-1, New Adarsh Apartment,
Sector-10, Dwarka,
New Delhi-110075.

….Petitioner

Through: Mr. Rakesh Kumar Khanna, Sr. Advocate with Ms. Abha R. Sharma, Ms. Puja Anand, Dr. Vikas Pahal and Mr. Raja Chatterjee, Advocates.

versus

COUNCIL OF SCIENTIFIC AND INDUSTRIAL RESEARCH
Anusandhan Bhawan
2 Rafi Marg,
New Delhi-110001.

.….Respondent

Through: Mr. Abhinav Hansaria, Advocate.

CORAM:
HON'BLE MS. JUSTICE NEENA BANSAL KRISHNA

J U D G M E N T

NEENA BANSAL KRISHNA, J.

1. The Petition under Section 34 of the Arbitration and Conciliation Act, 1996 *(hereinafter referred to as 'the Act'),* has been filed on behalf of the petitioner, to challenge the Interim Award dated 25.01.2024 dismissing the Application under Section 16 of the Act,1996.

2. It is submitted that *vide* Impugned Interim Award dated 25.01.2024, while rejecting the submissions raised by the petitioner, the learned Arbitrator has decided to continue with the arbitral proceedings, which has prejudiced the petitioner as his rights have been infringed; is violative, perverse and is liable to be dismissed.

3. It is asserted that *Section 21 of the Act,* is water tight and its compliance is mandatory to determine the date of commencement on which the request was made for the dispute to be referred to Arbitration and when such request was received by the other party. There was no valid *Notice of Invocation* ever served upon the petitioner as is evident from the documents filed in the main Petition, as well as from the affidavits of evidence which have already been submitted by the Claimant/respondent. The learned Arbitrator could not have continued with the proceedings by enlarging the scope of Section 21 of the Act.

4. Further, *Clause 8 and Clause 15 of the Agreement dated 07.03.2007* provided that a Monitoring Committee comprising of three eminent Experts in the area, shall monitor the Project for achieving its objective. In case during the tenure of the Project, it was found that it cannot be completed successfully, the Monitoring Committee may decide to foreclose the Project which shall be final and binding on all the parties. *Clause 15* which provided for Arbitration, specifically stated that the three members of Monitoring Committee shall act as an Arbitral Tribunal and the decision of the majority shall be final and binding on all the parties.

5. The Monitoring Committee of three Members, was constituted *vide* Office Order dated 07.03.2007, to monitor the Project. However, just at the last leg of the Project, there was an unexplained delay in payment of final

instalment which was not released by the respondent, but arbitrarily, abruptly, and unceremoniously the entire Project was shelved. The respondent despite letters and reminders, failed to release the payment of the amount.

6. The meeting of the Monitoring Committee was held on 24.04.2012, in the office/premises of the respondent, pursuant to which it directed the petitioner to comply with the directions and also for submission of documents etc. by the petitioner. The decision of the Monitoring Committee *qua* the categorical Waiver and Closure of the loan, was to be final and binding as per Clause 8 of the Agreement.

7. The respondent sent a *Legal Notice dated 20.12.2013* after almost one and a half years of the signed and settled Minutes of the Meeting. The respondent *vide* Letter dated 21.02.2014, referred the alleged disputes to Arbitration under Clause 15 of the Agreement, by appointing the Monitoring Committee as the Arbitral Panel.

8. It is submitted that the respondent failed to file the Statement of Claim till 2018, though as per its own submissions, it had invoked the Arbitration in the year 2014. The Arbitral Panel remained non-committal from 2014 till 2018. The respondent thus, filed the Petition under Section 14(1)(a) and 15 (2) of the Act, praying for substitution of the Arbitral Tribunal by appointment of a Sole Arbitrator. The said Application was hopelessly barred by time and was not maintainable under the said Sections. However, this Court allowed the Petition and appointed of the Sole Arbitrator.

9. The petitioner preferred a *Special Leave Petition* against that Order which was dismissed with a finding that all such issues can be adjudicated by the Arbitral Tribunal.

10. It is submitted that the impugned Order dismissing the Application under Section 16 of the Act, is *an Interim Award* against which the Petition under Section 34 of the Act is maintainable. It is further submitted that the Order of the learned Arbitrator is without consideration of vital evidence and *is patently illegal, perverse and irrational*. It is, therefore, in *violation of the principles of natural justice*. The *Tribunal was biased*, which is obvious and apparent from the fact that even though the statement of Claim was filed after taking time on two occasions, beyond the period of limitation, the learned Arbitrator had covered the objection of the petitioner by imposing petty costs as an eye wash. It is submitted that the impugned Interim Award is therefore, liable to be set-aside.

11. Learned counsel for the petitioner, in support of its assertions, has placed reliance on *Indian Farmers Fertilizer Cooperative Limited vs. Bhadra Products,* (2018) 2 SCC 534; *B and T AG vs. Ministry of Defence,* MANU/SC/0601/2023 and *Shriram Transport Finance Co. Ltd. vs. Shri Narender Singh* in FAO(COMM) 179/2021 and CM APPL. 39706/2021.

12. Learned counsel on **behalf of the respondent**, has not filed any formal Reply but has taken a preliminary objection that the impugned Order is not an Interim Award. It is a simplicitor dismissal of the Application under Section 16 of the Act against which the Petition under Section 34 of the Act, is not maintainable for which reliance has been placed on *Deep Industries Limited vs. Oil and Natural Gas Corporation Limited And Another,* (2020) 15 SCC 706.

13. Submissions heard.

14. A *preliminary objection* has been taken in regard to the maintainability of the Petition under Section 34 of the Act against an Order dismissing the Application under Section 16 of the Act.

15. In the case of *IFFCO Ltd.* (*supra*), the Apex Court explained that Section 16 of the Act lays down the principle of *Kompetenz- Kompetenz* i.e. the Arbitral Tribunal may rule on its own jurisdiction. While adjudicating on the jurisdiction under Section 16 of the Act, it refers to three things: *(1) as to whether there is an existence of a valid Arbitration Agreement; (2) whether the Arbitral Tribunal is properly constituted; and (3) matters submitted to the Arbitration, should be, in accordance with the Arbitration Agreement.* The jurisdiction is a coat of many colours and that the word displays a certain colour depending upon the context in which it is mentioned. Jurisdiction may be defined as the power of the Court to hear and determine a cause, to adjudicate and exercise any judicial power in relation to it; in other words, by jurisdiction, it is meant the authority by which a Court has to decide matters that are litigated before it or to take cognizance of the matters presented in a formal way for its decision.

16. Section 16 of the Act deals with the competence of the Arbitral Tribunal to rule on its jurisdiction. It reads as under:

> "***16. Competence of arbitral tribunal to rule on its jurisdiction.***
> *(1) The arbitral tribunal may rule on its own jurisdiction, including ruling on any objections with respect to the existence or validity of the arbitration agreement, and for that purpose,—*

(a) an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract; and

(b) a decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause.

(2) A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence; however, a party shall not be precluded from raising such a plea merely because that he has appointed, or participated in the appointment of, an arbitrator.

(3) A plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings.

(4) The arbitral tribunal may, in either of the cases referred to in sub-section (2) or sub-section (3), admit a later plea if it considers the delay justified.

(5) The arbitral tribunal shall decide on a plea referred to in sub-section (2) or sub-section (3) and, where the arbitral tribunal takes a decision rejecting the plea, continue with the arbitral proceedings and make an arbitral award.

(6) A party aggrieved by such an arbitral award may make an application for setting aside such an arbitral award in accordance with section 34."

17. Clause 2 of Section 16 provides that the objection in regard to the lack of jurisdiction of the Arbitral Tribunal shall not be raised later than the submission of the Statement of Defence. Either party i.e. even a party who

has appointed the Arbitrator is not precluded from challenging the jurisdiction of the Arbitrator. While Clause 2 provides the time frame for challenging the jurisdiction, Clause 3 further provides that where a plea is taken that the Tribunal is exceeding the scope of its authority, it shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral pleadings. Clause 4 given the discretion to the Arbitral Tribunal to admit the plea later if it considers the delay to be justified.

18. Sub Section (ii) 5 further provides that in case the Arbitral Tribunal rules in favour of its jurisdiction by dismissal of the application under Clause 2 or Clause 3, it may proceed further with the arbitral proceedings and make the arbitral award. Such award when adjudicated by the Arbitral Tribunal, becomes challengeable under Section 34, as is stated in Clause 6.

19. From Section 16 it is evident that on dismissal of the application challenging the jurisdiction of the Arbitral Tribunal, it is mandated that the Arbitral Tribunal shall proceed further with the trial on merits. The ultimate culmination of the adjudicatory process in an Award, which is subject to challenge under Section 34 of the Act.

20. The question which arises is what is the remedy available to a party in case of dismissal of the application under sub-Clause (2) and (3) of Section 16 of the Act.

21. *Section 37 of the Act* provides for appealable orders. Sub-Section (2) of Section 37 reads as under:

> *"(2) An appeal shall also lie to a Court from an order of the arbitral tribunal*
>
> *(a)* ***accepting the plea referred to in sub-section (2) or sub-section (3) of section 16;*** *or*

(b)granting or refusing to grant an interim measure under section 17."

22. It specifically provides that the Appeal under Section 37 would be maintainable only if the application under Section 16(ii) and (iii) is allowed. This explicitly ousts the remedy of Appeal under Section 37 of the Act against the Order dismissing the Application under Section 16(ii) and (iii).

23. In the case of *NTPC Ltd. vs. Siemens Atkeingesellschaft*, (2007) 4 SCC 451, the Apex Court while setting out Section 16 and 37, observed that an Appeal under Sub-Section 2 of Section 37 lies only if there is an Order allowing the application under Section 16(2) and (3) of the Act.

24. In *SBP & Co. vs. Patel Engg. Ltd.,* (2005) 8 SCC 618, Apex court observed that the Tribunal under Sub-Section (5) has the obligation to decide the plea and where it rejects the plea, it would continue with the arbitration proceedings and finally passed the Award on the merits. Sub-Section (6) of S.16 further provides that party aggrieved by such an Arbitral Award, may make an application for setting-aside such an Arbitral Award, in accordance with *Section 34* of the Act. While challenging such Award, a party may also raise the contention that the Tribunal had no jurisdiction to pass it or that it had exceeded its authority in passing it. This happens only when the Tribunal passes an Award. However, in a case where the Tribunal overrules the objection relating to jurisdiction and dismisses the Application under Section 16 of the Act, no Appeal is provided and the party must await the passing of final Award at which stage it may be raised in the Petition under Section 34 of the Act. However, where the Application under Section 16 of the Act is allowed and the Tribunal dismisses the arbitral proceedings

in such a case, the aggrieved party may directly file an Appeal under Section 37 (2).

25. Similar observations were made by the Apex Court in the case of *Deep Industries Limited vs. Oil and Natural Gas Corporation Limited And Another (supra),* that no Appeal or Petition under Section 34 of the Act, lies against an Order dismissing the Application under Section 16 of the Act.

26. The impugned Order has dismissed the Application under S.16 of the Act and has proceeded to adjudicate the Claim on merits. Such dismissal order is beyond the challenge under S.34 of the Act as has been held in the case of *Patel Engg. Ltd.,(supra).*

27. The logic for deferring a challenge to the Order dismissing the Application under Section 16 till passing of Award is self-evident; the intention of Arbitration Act was to minimize judicial intervention at every stage, in order to facilitate expeditious adjudication of disputes through arbitration. If every Order was made appealable, it would be destructive of the object of Arbitration Act itself as it would become akin to litigation and thus, dilatory. Experience has shown that tendency to rush to the court against every Order, has contributed to inordinate delays in disposal of cases through Arbitration. It is in this spirit that the Act envisages that such Orders as one dismissing the Application under S.16 of the Act, which are essentially interlocutory, may be challenged along with the Award in the petition under S. 34 of the Act. Therefore, the present petition under S.34 of the Act, is barred under the law; such order can be challenged when it culminates into the Interim/Final Award.

28. *Significantly,* the petitioner has sought to justify the present petition on the ground that dismissal of such Application tantamount to *Interim*

Award. In the case of ***IFFCO Ltd. (supra***) distinction of Interim and Final Award has been explained.

29. It was observed that a preliminary Issue affecting the whole claim would expressly be the subject matter of an interim award. In *Exmar BV vs. National Iranian Tanker Co.* (1992) 1 Lloyd's Rep 169, it was explained that the Award which finally decides a particular issue to finally determine the rights of the parties constitutes an Interim Award.

30. In *Satwant Singh Sodhi vs. State of Punjab* (1999) 3 SCC 487 it was explained by the Apex Court that if the Interim Award is intended to have effect only so long as the final Award is not delivered, it will have the force of the interim Award and would cease to have effect after the final Award is made. If on the other hand, the interim Award is intended to finally determine the rights of the parties, it will have the force of a complete Award.

31. In *McDermott Internation Inc. vs. Burn Standard Co. Ltd.* (2006) 11 SCC 181 under the heading "*validity of partial Award"* the Apex Court held that an Award is defined under Section 2(c) to include an interim Award. Section 31 (6) also contemplates an interim Award. According to this provision, an interim Award is not one in respect of which final Award can be made, but it may be a final Award on the matter covered thereby, but at an interim stage. It was further observed that when the Arbitrator chooses to treat certain disputes at first instance and it gives a finding in respect of those Claims with a finality attached to it, it would be deemed to be a final Award under Section 2(c) of the Act for intent and persons.

32. The aforesaid judgments therefore, make it clear that on the matters covered in an interim Award, is a final Award in respect of the issues when

adjudicated finally therein, though made at an intermediate stage of the arbitral proceedings.

33. In *Iffco Farmers Fertilizer Cooperative Limited* (supra) applying the aforesaid Test as defined in the judgments discussed above, ___Court held that an *issue of Limitation* when decided has a finality to it, is an Interim Award against which challenge under Section 34 of the Act is maintainable.

34. In a separate concurring judgment P.K. Balasubramanium, J. in the case of *NTPC* (supra) (*in reference to Code of Civil procedure*) observed that in the larger sense any refusal to go into the merits of the claim may be within the realm of jurisdiction. Even the dismissal of a claim as barred by Limitation, touches on the jurisdiction of the Court. When a Claim is dismissed on the ground of being barred by limitation, it will be in a sense a case which the Tribunal refuses to exercise its jurisdiction on the merits of the case. A finding on the plea of limitation in favour of party would oust the jurisdiction of the Court and so an erroneous decision can be said to be concerned with the question of jurisdiction which would fall within purview of Section 115 of CPC.

35. Therefore, simplicitor dismissal of Application under Section 16 of the Act, deciding the jurisdiction of the Arbitrator to continue with the adjudication, cannot be termed as an interim Award and therefore, ***the present petition under S.34 of the Act is clearly not maintainable.*** The Petitioner would have to wait for the final Award to challenge this Order as well, if the need be.

36. It may be pertinent to refer to the decision in the case of *Vidya Drolia* v. *Durga Trading Corporation*, (2021) 2 SCC 1 where the Apex court held that at the stage of considering the application under

Section 11(6) the *two facts* essentially which are required to be considered are : *whether there is an arbitration clause and the disputes are arbitrable*. The issue of limitation should be left for the learned Arbitrator except where the claims are blatantly on the face, barred by limitation.

37. The only relevant factor thus, significant for the purpose of the Section 16 of the Act, is whether the Arbitral Tribunal got constituted in accordance with the Agreement between the parties and whether such constitution of Tribunal was within limitation.

38. The main ground of challenge raised by the Petitioner to dismissal of Application under Section 16 of the Act, was that there was no proper invocation of Arbitration as no service of Notice of Invocation under Section 21 of the Act, was effected and therefore, initiation of the arbitral proceedings was bad in law.

39. The learned Tribunal has given a reasoned Order stating that the service of Notice under Section 21 though disputed, has been admitted at the time of admission/denial of the documents wherein the signatures were admitted but the contents of the Notice were denied. The learned Tribunal, therefore, has justifiably concluded that the service of Notice prior to initiation of the arbitral proceedings, has been duly accepted. It has also been observed that the said *Notice* dated *20.12.2013*, is in accordance with the Section 21 as it quoted not only the Arbitration Clause but also stated the amount of Claim being raised by the respondent. *It cannot be said that there was any finding given about the Claims being barred by limitation.* The observations are essentially in the context of the invocation of arbitration and consequent constitution/appointment of the Arbitrator being in accordance with law.

40. Once the Tribunal is constituted, then any challenge to the Claim being filed belatedly or being beyond the limitation are the subject matter of trial and adjudication and are neither relevant for the purpose of S.16 of the Act nor any finding has been given about the Claims being within limitation. The stage of determination of the Claims being barred by limitation, is yet to come and no finding on merits has been given in the impugned Order, which was limited to adjudication on the jurisdiction of the Ld. Arbitrator to commence the arbitration proceedings.

41. Once the Tribunal has been duly constituted, there is no time limit for filing the application under S. 14&15 of the Act. The learned Tribunal has thus, *rightly rejected the contention* of the petitioner that the filing of the Application after five years, under Section 14 & 15 for substitution of the Arbitrator by the respondent, was barred by limitation.

42. The second contention of the petitioner that the ld. Arbitrator was *biased* since she permitted the filing the *Statement of Claim* after almost nine years of initiation of arbitral proceedings by learned Arbitral Tribunal. This plea was rejected as the arbitral proceedings got initiated in the year 2014 and the limitation for filing of the Claim has to be calculated from the date of invocation of Notice i.e. *20.12.2013*.

43. It is also pertinent to note that the delay in submission of the Claim, was also essentially because though the Tribunal was constituted in 2014, it did not function and eventually *vide* Notice dated 29.05.2018 a member of the Arbitral Tribunal had expressed his difficulty to hold the meetings at New Delhi, thereby necessitating the Application under Section 14 and 15 of the Act for the change of the Arbitral Tribunal. The present Ld. Arbitrator was appointed on 17.01.2023 and has commenced the proceedings

immediately thereafter. The respondent had filed the Claim on 04.04.2023 and even the admission/ denial of the documents has also been done and the matter is pending at the stage of evidence; neither any inordinate delay can be imputed to the Ld. Arbitrator..

44. It may also be observed that the Section 29-A of the unamended Arbitration Act provided that the arbitration proceedings may be concluded within eighteen months and the amended Section 29-A (as amended on 23.10.2015) gives six month for completion of pleadings but the time frames are not mandatory; *rather they are directory leaving it to the discretion of the Ld. Arbitrator* as this section itself provides for grant of extension of mandate of the Arbitral Tribunal to complete the adjudication and does not prescribe any time lines for grant of extension or for completion of the arbitral proceedings and pronounce the Award.

45. Once the Tribunal has assumed the jurisdiction in terms of the Act, then the Tribunal is well within its jurisdiction to grant extension of time for completion of pleadings; it cannot be said that the ld. Arbitrator was biased merely because two adjournments were granted to the Petitioner and that too, subject to cost. The Claim had been filed within 90 days of Appointment of the substitute Arbitrator.

46. The impugned Order is neither perverse nor patently illegal and also does not suffer from any fundamental policy of Indian law. The petitioner in its grounds to challenge the Order, has merely used these words without explaining how the Order is perverse. It has been categorically held that the Notice of Invocation was duly served and was well within the limitation period. There is no patent illegality or perversity in the impugned Order, which only pertains to the Application under Section 16 of the Act *vide*

which the challenge to the jurisdiction of the learned Arbitrator, has been rejected. Further, such dismissal of Application under Section 16, does not amount to an interim Award or an Arbitral Award and no Petition under Section 34 of the Act, is maintainable.

47. The Petition is hereby dismissed. The pending applications also stand disposed of.

(NEENA BANSAL KRISHNA)
JUDGE

MAY 31, 2024/RS