IN THE HIGH COURT OF DELHI AT NEW DELHI

Judgment delivered on: March 27, 2023

\+ O.M.P. (COMM) 275/2022, I.A. 10380/2022

NTPC LTD ..... Petitioner

Through: Ms. Maninder Acharya, Sr. Adv. with Mr. Tarkeshwar Nath, Mr. Deepanshu Dudeja, Mr. Lalit Mohan, Mr. Virat Saharan & Mr. Harshit Singh, Advs.

versus

LARSEN AND TOUBRO LIMITED & ANR. ..... Respondents

Through: Mr. Rajeev Virmani, Sr. Adv. with Mr. Kirat Singh Nagra, Mr. Kartik Yadav, Mr. Hardik Jain, Mr. Vardaan Wanchoo and Ms. Sumedha Chadha, Advs. for R-1

CORAM:
HON'BLE MR. JUSTICE V. KAMESWAR RAO

J U D G M E N T

V. KAMESWAR RAO, J

1. This petition has been filed under Section 34 of the Arbitration and Conciliation Act, 1996 ("Act of 1996", hereinafter) challenging the order dated February 18, 2022 passed by the Arbitral Tribunal rejecting the application of the petitioner herein seeking

updation/revision of its counter claims.

2. The petitioner, NTPC Limited, is a wholly owned company of the Government of India, registered under the Companies Act, 1956. The respondent No. 1, Larsen and Toubro ('L&T', for short) and respondent No.2, Alpine Mayreder Bau GmbH ('Alpine', for short), are the constituents of a Joint Venture ('JV', for short), which was awarded a contract, pursuant to which an agreement dated January 19, 2007 was entered into, with the said JV on the first part and the petitioner on the second part.

3. Owing to certain disputes amongst the parties, an Arbitral Tribunal consisting of three members was constituted. Respondent No.1 submitted its Statement of Claims before the Tribunal, arraying the petitioner and respondent No. 2 herein as respondent Nos. 1 and 2 respectively. On January 09, 2014, the petitioner terminated the agreement dated January 19, 2007, invoking clause 63 therein, citing failure on part of the respondent No. 1 in discharging its contractual obligations.

4. Accordingly, the respondent No.l/claimant sought an amendment in its Statement of Claims, challenging the said termination dated January 09, 2014, though as a consequence of the initial prayer. The amendment application was allowed and the amended Statement of Claims dated December 01, 2014 was taken on record. The petitioner herein filed its reply to the amended Statement of Claims of the respondent No. l. The Statement of Defence and counter-claims were filed by the petitioner on January 14, 2016, comprising of 12 claims, while reserving its right to revise/raise further

claims as and when the situation arises. An amount of ₹386,61,81,750/- calculated up to September 30, 2015 on estimation basis was claimed by the petitioner towards counter-claim No. 1, i.e., Claim towards Risk and Cost.

5. The contract for the remaining work was awarded by the petitioner to a company namely M/s HCC Limited ('HCC', hereinafter) at the risk and cost of the JV. In terms of the directions of the Tribunal dated April 21, 2017, all contractual documents pertaining to the contract awarded to HCC were placed on record on May 27, 2017. Thereafter, the respondent No.1 filed evidence by way of affidavit of its witness CW -3, which mentions exhaustively the BOQ items/ rate, technical specifications, provisions etc. of the contractual documents of HCC. It is stated that the respondent No.1 was very much aware of the contents of the contractual documents of HCC and they had nothing to add as its defence for rebuttal of the amount as sought to be updated under Counter Claim No. 1.

6. It is the case of the petitioner that the contract value of the balance work to be executed at the risk and cost of the respondent No. 1 stands amended to ₹651,66,32,773.57 *vide* amendment dated January 01, 2021, which was issued in variation of BOQ items having financial implications. With the addition of departmental overheads @10% of the awarded value of the remaining work, the risk and cost amount as on May 31, 2021 comes to ₹4,96,76,31,821/-.

7. Details of the counter-claims of the petitioner with the amount revised up to May 31, 2021 as provided by the petitioner is reproduced below:-

Summary of Counter Claim up to 31.05.2021		
Particular of Claim	**Already Claimed Amount**	**Revised Amount upto 31.05.2021 (in Rs.)**
Counter Claim No.l Recovery against Risk and Cost	386,61,81,750	496,76,31,821
Counter Claim No.2 Recovery against Liquidated Damage (LD)	22,79,60,832	22,79,60,832
Counter Claim No.3 Recovery for premium paid against CAR policy/insurance	3,22,20,975	3,40,71,408
Counter Claim No.4 Expenditure incurred towards dewatering and other essential services of HRT like, lighting, ventilation, D.G. sets etc.	1,77,78,515	2,65,46,181
Counter Claim No.5 Amounts towards Material advance	6,45,49,887	6,45,49,887
Counter Claim No.6 Amount towards Import duty benefit availed	8,56,18,890	8,56,18,890
Counter Claim No.7 Recovery towards legal/Arbitral expenses	5,63,27,722	8,49,03,157
Counter Claim No.8 Recovery for Revenue loss due to non-completion of the work	2649,30,00,000	2846,78,00,000
Counter Claim No. 9 Recovery of Interest on outstanding advances and claim amounts	26,83,49,679	96,79,20,616
Counter Claim No.10 amounts towards Equipment advance	34,48,56,531	34,48,56,531
Counter Claim No. 11	4,62,01,067	4,62,01,067

Amounts towards Adhoc advance		
Counter Claim No. 12 Amount towards Royalty Charges, Worker's cess and other statutory compliances	39,56,535	6,21,072
	3150,70,02,383	**3531,86,81,464**

8. It is the case of the petitioner that claim Nos. 1, 7 and 9 have not crystallised and as such it reserved its right to raise further claims as and when the occasion arises. The petitioner then moved an application on July 24, 2021 before the Tribunal seeking permission to place the amount revised/updated for counter-claims Nos. 1, 3, 4, 7, 8, 9 and 12. An application under Order II Rule 2 of the Code of Civil Procedure, 1908 (CPC) was also moved by the petitioner seeking leave to raise the claims as and when the situation arises. The respondent No. l filed its reply to the said application. No rejoinder thereto was allowed to be filed. After hearing the arguments of both the parties on the said application, the Tribunal made the impugned decision dated February 18, 2022, rejecting the application filed by the petitioner holding that the same is filed belatedly. The Tribunal *vide* the impugned order also granted liberty to the petitioner to invoke fresh arbitration if permissible under the contract, with regard to the updated claims. One of the Ld. Arbitrators dissented with the decision, and allowed the application of the petitioner.

9. Ms. Maninder Acharya, learned Senior Counsel appearing for the petitioner submitted that the Arbitral Tribunal exceeded its jurisdiction by not adhering to Clauses 63.1, 63.2 and 63.3 of the

Contract Agreement, which on their conjoint reading make it amply clear that both the parties are *ad idem* that the cause of action which has arisen at the time of termination, would persist till the expiry of three years from the date of completion of the defect liability period. The Tribunal ought to have seen that it is an admitted fact that the contractual work in terms of the Contract Agreement dated January 19, 2007 which was terminated at the risk and cost of JV, is still not complete and the amount for counter claim Nos. l, 7 and 9 which is to be recovered from the respondent No.l in terms of contractual provisions, is yet to be crystallised, and therefore the cause of action for recovery which arose with the termination of the contract is still continuing.

10. It is the case of the petitioner, as has emerged from the grounds of the petition, that the Tribunal has erred in holding that the updation application filed by the petitioner is in fact an application for amendment of substantive pleadings in respect of the counter-claims. According to the petitioner, the application is seeking 'updation / revision' and not amendment.

11. She stated that the impugned order is illegal and contrary to law inasmuch as the Tribunal has exceeded its jurisdiction by rejecting the updation application on the ground of limitation, which is a mixed question of fact and law, and could not be decided at this stage.

12. The petitioner sought updation/ revision of the counter-claims No. 1,3,4,7,8, 9 and 12 respectively by moving an application without changing the pleading or the cause of action. The necessity arose for the reason that out of the total 12 counter-claims, the amount of the

aforesaid counter-claims, with the passage of time, except claim no. 12, has enhanced. The updation is formal in nature which does not change the nature of the case. The counter-claims were filed before the Tribunal with the amount of claim calculated up to September 30, 2015 along with the Statement of Defence on January 14, 2016 after the contract was terminated on January 09, 2014, admittedly well within the stipulated time. Liberty was reserved by the petitioner to add, modify or supplement the same as and when the situation arises. Counter claim No. 1 is for recovery against risk and cost which was claimed initially for a sum of ₹386,61,81,750/- up to September 30, 2015 which comes to ₹496,76,31,821/- on calculation up to May 3l, 202l. The last amendment was issued on January 01, 2021 with the revised contractual value up to ₹651,66,32,773/- which after adding the departmental overheads and the value of work done and deduction of value of the remaining work comes to ₹496,64,87,863/-. Counter claim No. 3 is for recovery of the premium paid against car policy/insurance which gets enhanced because of the insurance premiums borne by the petitioner beyond September 30, 2015 till award of the remaining works. So is the case with counter claim No. 4 which is for expenditure incurred towards dewatering and other essential services of HRT like lighting, ventilation, D.G. sets etc. for the period beyond September 30, 2015 till award of the remaining works. Counter claim No. 8 also stands on the same footing, wherein; the petitioner has sought the recovery of revenue loss caused by the delay in commissioning of the project due to non-completion of the work by the JV. Counter claim No. 9 is for recovery of interest on outstanding advances and claim

amounts which is bound to be enhanced for the reason that the interest can be levied on the outstanding advances which is still lying with the JV. However, the amount towards royalty charges, workers' cess and other statutory compliances get reduced for the reason that the same is paid regularly. According to her, disallowing the application seeking updation/revision has left no scope for the petitioner to get the said upgraded/revised amount adjudicated in any forum.

13. Ms. Acharya submitted that the liberty granted to the petitioner by the Tribunal to raise a fresh arbitral proceeding is merely illusory for multiple reasons. Firstly, the said application has been rejected on the ground of delay as mentioned in Section 23 of the Act of 1996 in ignorance of specific clauses 63.1, 63.2 and 63.3 of the Contract Agreement which fix the timeline for the cause of action. Secondly, the amount which is sought to be updated has come into existence during the continuation of the present arbitration proceedings. Thirdly, a new Tribunal, if constituted for adjudication of the present updated amount, will certainly be influenced by the ground of delay stated by the present Tribunal for rejection of the application, leaving the petitioner which is a public sector undertaking, remediless. The ground of delay, in case the impugned order is sustained, will be available to the respondent No.1 which would come in the way of the petitioner if a fresh arbitration with respect to the said updated/revised amount of counter-claims, is initiated. In other words, the rejection of the application by the Tribunal entitles the respondent No.1 to take up a ground of limitation as and when the adjudication of the updated/revised claims is sought before any of the forum. Thus, a huge

sum of public money would remain un-adjudicated and the petitioner will be deprived of the same. According to her, this manifests that the rejection of the application seeking updation/ revision of the amount of counter-claims has decided the *lis* finally without considering the same on merit. In fact, the arbitral proceedings *qua* the said claims sought to be updated gets terminated with the rejection of the application of the petitioner in terms of Section 32 of the Act of 1996 inasmuch as this is the final settlement of the disputes *qua* those updated/revised claims. Substantive rights of the petitioner have been decided by the Tribunal which means that the petitioner cannot in future claim the relief as they have sought for by way of the application seeking updation/ revision.

14. Further, it is stated that the Tribunal, while disposing of the application, has decided finally the issue of updation with respect to the amount sought to be revised and therefore, the impugned order has the trappings of finality / final determination of the controversies before the Tribunal. As such, the impugned order is an interim award in terms of Section 2(c) and Section 31(6) of the Act of 1996, and therefore, the petition under Section 34 of the Act of 1996 is maintainable. Regarding the scope of an interim award under the Act, she has referred to the decision of the Supreme Court in ***Farmers Fertiliser Co-operative Limited v. Bhadra Products, 2018 (1) Arb. LR 271 (SC)***, wherein it was observed as under:-

> *"The language of Section 31 (6) is advisedly wide in nature. A reading of the said sub-section makes it clear that the jurisdiction to make an interim arbitral award is left to the good sense of the arbitral tribunal, and that it extends to "any matter" with respect to which it may*

> *make a final arbitral award. The expression "matter" is wide in nature, and subsumes issues at which the parties are in dispute. It is clear, therefore, that any point of dispute between the parties which has to be answered by the arbitral tribunal can be the subject matter of an interim arbitral award."*

15. She has also referred to the judgment in ***Cinevistaas v. Prasar Bharti, 2019 SCC OnLine Del 7071***, wherein this Court while referring to ***Farmers Fertilizer Co-operative Limited (supra)*** and also the judgment in ***Shah Babulal Khimji v. Jayaben D Kania, (1981) 4 SCC 8,*** set aside the order of an Arbitral Tribunal rejecting an application seeking amendment on the ground of delay, holding as under:-

> *"The rejection of the additional claims has in fact resulted in greater delay rather than expeditious disposal. The bona fides of the Petitioner are not in question. Rejection of additional claims by the impugned order have all the trappings of an award and hence the Section 34 petition is clearly maintainable. On the basis of the tests laid down in Shah Babulal Khimji (supra), the rejection of the application to add or expand the amounts claimed under certain heads results in a conclusive determination that the said claims cannot be adjudicated. Thus, there is not just formal adjudication but in fact a final rejection of the said claims. This constitutes a dismissal of the claims and hence would constitute an award within the meaning of Section 2 (1)(c) of the Act."*

16. Reliance is also placed on ***Lt. Col. H.S. Bedi (Retd) and Anr. v. STCI Finance Limited, OMP(COMM.) 546/2020*** wherein the following was observed:-

> *"In the judgment in the case of Cinevistaas Ltd. (supra) on which reliance was placed by Mr. Vachher, in paragraph 35, which I have already reproduced above, the Coordinate Bench has held that as long as the disputes fall broadly within the reference, correction and amendment ought to be permitted as the principles as laid down by the Supreme Court in Shah Babulal Khimji v. Jayaben D. Kania, (1981) 4 SCC 8, would have a greater application in arbitral proceedings as the said judgment lays down principles that the substantive rights affected ought to be seen, while determining what kind of orders are challengable."*

17. Ms. Acharya has submitted that the rejection of the application of the petitioner solely on the ground of delay under Section 23(3) of the Act of 1996, ignoring the specifically agreed clauses 63.1, 63.2 and 63.3 of the Contract Agreement, is patently illegal and unsustainable. Cause of action which arose with the termination of the contract is still continuing and would expire 3 years after the completion of the work. There is no delay in seeking updation/ revision of the counter-claims in view of the fact that the counter-claims are within the period of limitation. The work awarded under the contract to the JV on November 28, 2006 is still being carried out though another agency i.e. HCC, which got the contract at the risk and cost of the JV. In view of continuance of the work and non- completion thereof, the cause of action for the counter claim No.1 and other counter-claims against the JV is still continuing, which otherwise arose when the contract with the JV was terminated on January 09, 2014. Though the revision/ updation is within time as no timeline is fixed for the same, on a conjoint reading of clauses 63.1,63.2 and 63.3 of the Contract Agreement, it is

amply clear that both the parties are ad idem that the cause of action, would expire only three years after the completion of the defect liability period. In other words, the petitioner gets the right to make a claim against the JV even after the expiration of the defect liability period and till the expiry of three years thereafter. In terms of clauses 63.1 and 63.3 of the Contract Agreement, the JV is not discharged from its obligations and liabilities with the award of the contract to HCC. It is her contention that HCC has stepped into the shoes of the JV and therefore, the JV is liable to fulfill all its obligations and liabilities until expiry of the defect liability period in terms of the provisions of the contract signed between the JV and the petitioner. She has referred to the judgment in ***Indian Oil Corporation Ltd. v. SPS Engineering Ltd., (2011) 3 SCC 507*** (Indian Oil Corporation-I hereinafter), wherein the Supreme Court in a petition filed under Section 11 of the Act of 1996 dealt with the similar clauses and after exhaustive deliberation has held that the cause of action for a claim would start after the work is completed if the work is awarded to a new contractor at the risk and cost of the earlier one. Further reliance is placed on the decision of this Court in a petition under Section 34 of the Act of 1996 titled ***Indian Oil Corporation Ltd v. SPS Engineering Ltd., 2018 LAWPACK (Del) 63759*** (Indian Oil Corporation-II hereinafter).

18. She has also relied upon the judgment of the Supreme Court in ***A.K. Gupta and Sons v. Damodar Valley Corporation, (1996) 1 SCR 796*** to contend that where the amendment does not constitute an addition to the facts already on record, the amendment would be

allowed even after the statutory period of limitation, and the judgment of the High Court of Kerala in ***K.K. Scaria v. N, Mohandas and Ors., 2015 SCC OnLine Ker 1632*** to contend that the discussion to allow amendment is considerably wide under Section 23(3) of the Act of 1996 and is not circumscribed as in the case of a suit by the provisions of the CPC.

19. According to her the impugned decision is patently illegal, as per the principles laid down by the Supreme Court in the cases of ***Indian Oil Corporation Limited v. Shree Ganesh Petroleum Rajgurunagar, (2022) 4 SCC 463***; ***Associate Builders vs. DDA (2015) 3 SCC 49***; and ***Ssangyong Engineering and Construction Company Ltd. v. National Highway Authority of India (NHAI) (2019) 15 SCC 131***.

20. That apart, it is her argument that no prejudice is caused to the respondent No. 1 in case the application is allowed, for the reason that the JV had itself agreed *vide* clause 63.1 of the Contract Agreement, that the petitioner shall be authorised to terminate the contract and to complete the work either by itself or through any other contractor at the risk and cost of the JV.

21. She has also relied upon the judgments in ***Dhannalal v. Kalawati Bai (2002) 6 SCC 16***; and ***Gammon India Ltd. v. National Highways Authority of India, AIR (2020) DEL 132***, to argue that the rejection of the application and the liberty granted by the Tribunal to the petitioner to initiate fresh arbitration would lead to multiplicity of litigation, which is contrary to the basic intent of the Act of 1996, which contemplates a fundamental principle that an Arbitral Tribunal

shall adjudicate all disputes in one and the same proceeding.

22. Mr. Rajeev Virmani, learned Senior Counsel appearing for the respondent No. 1 would state at the outset that the present petition is ex-facie not maintainable as the impugned order is neither an award nor an interim award in terms of Section 2(1)(c) read with Section 31 (6) of the Act of 1996. There is no final determination of the claims sought to be raised by the petitioner by its application. The impugned order merely disallows the petitioner to amend the counter-claims, leaving it open to the petitioner to raise the same in fresh arbitration, if permissible under law. A petition under Section 34 of the Act of 1996 is maintainable only against an award defined under 2(1)(c) read with Section 31 (6).

23. According to him, an order accepting or dismissing an application seeking amendment of pleadings under Section 23(3) of the Act of 1996 cannot be termed as an interim award, if it has not decided the issue finally so as to allow challenging such order under Section 34. The impugned order lacks the feature of finality. Pertinently, in the impugned order, the Tribunal has expressly noted at paragraph 7.1 of the impugned order that "nothing in the Order shall be construed as a final determination on merits of the case for any issue touched upon or decided by this Order.". Further, in paragraph 7.2 of the order, the Tribunal has left it open for the petitioner to invoke fresh arbitration with regard to the claims made in the application seeking amendment of the counter-claims. Furthermore, the impugned order does not record any finding on any of the issues raised before the Tribunal in the arbitration proceedings between the parties. Therefore, the twin

test of issue and finality are not met so as to term the impugned order as an award or an interim award under the Act of 1996. Therefore, it is sufficiently clear that the Tribunal has made no final determination on the controversies before it, and as such the impugned order is not amenable to challenge before this Court under Section 34 of the Act of 1996.

24. That apart, the impugned order records no finding that the claims sought to be brought in by the petitioner by way of amendment in the counter-claims are barred by limitation as has been wrongly suggested in the petition. Rather the Tribunal has expressly refrained from going into the issue of limitation as is evident from paragraph 7.20 of the impugned order, which reads as under:-

> *"The Tribunal therefore rejects the Updation Application filed by the Respondent No.1. The Tribunal does not consider it necessary to dwell upon the other arguments raised by the Claimant, including the issue of limitation and waiver, and dismisses the application on the ground of delay and prejudice alone. "*

25. He stated that the petitioner moved the amendment application after a considerable delay of nearly 5.5 years at a stage when both the parties had already led their evidence and concluded their final arguments. Considering the status of the arbitration proceedings allowing the amendment application would cause grave prejudice to the respondent No.1. It is for this reason that the Tribunal considered it inappropriate to allow the application. In the present facts, if the petitioner is allowed to challenge the impugned order, the same would be tantamount to condonation of the gross delay which has been

committed by the petitioner willfully without any just and sufficient cause explaining the delay.

26. In support of his contentions, he has referred to the judgments of this Court in the following cases:

1. ***Container Corporation of India v. Texmaco, (2009) SCC OnLine Del 1594***
2. ***VIL Rohtak v. NHAI, OMP (COMM) 339/2021***

27. Further, it is stated that the Tribunal has dismissed the petitioner's application by exercising its discretion under Section 23(3) of the Act of 1996 while considering the gross delay on part of the petitioner. As such, the discretion exercised by the Tribunal is not amenable to judicial review, much less in a petition under Section 34 of the Act of 1996.

28. Yet another submission of Mr. Virmani is that the application seeking amendment of the counter-claims has been rejected taking into account the delay on the part of the petitioner. The impugned order does not reject the claims sought to be introduced in the counter-claims at all much less on the ground that these would be barred by limitation. He contended that limitation is statutorily recognized as a bar to a suit or a claim by virtue of Section 3 of the Limitation Act, 1963 read with Section 43 (1). On the other hand, delay, in the context of Section 23 (3) of the Act of 1996 precludes the parties from amending its pleadings during the course of arbitral proceedings without affecting the rights and contentions of either party on maintainability of new claims / counter-claims in the subsequent proceedings. Thus, there is a

clear distinction between a claim being barred by limitation and its consequent rejection, and an application of amendment being disallowed by the Tribunal considering it inappropriate on the threshold of delay in making it and the prejudice that it would cause. To demonstrate the distinction between delay and limitation, Mr. Virmani has relied upon the Judgment of the Supreme Court in the matter of ***P Daivasigamani v. S. Sambandan, Civil Appeal No. 9006/2011***.

29. He has relied upon the table provided in paragraph C of his written submissions to contend that the petitioner failed to provide any justification or cause for not filing the application for amendment of its counter-claims for nearly 5½ years after the contract was awarded to HCC Limited. He stated that though the petitioner had put forth a ground in its petition that there is no delay, during the course of hearing, the learned counsel for the petitioner submitted that due to the petitioner company's officers being on COVID-19 duty it could not file the said application at an earlier stage. However, there was no COVID-19 in 2016, when HCC was awarded the contract, and COVID-19 did not deter the petitioner from leading its evidence and addressing final arguments.

30. Mr. Virmani has also sought to controvert the submission of Mr. Acharya that the application was not seeking amendment, but was only for updation. If the petitioner's application was merely for updation as contended that the same would not be maintainable as there is no provision in the Act of 1996 conferring jurisdiction upon the Tribunal for accepting anything beyond the pleadings for

adjudication. As per Section 23 (1) of the Act any claimant or counter-claimant is mandatorily required to state all the facts supporting its claims / counter-claims, the points at issue and the relief sought. Any digression from the original claims / counter-claims under Section 23 (1) of the Act can be entertained by the Tribunal only if it satisfies the criteria for amendment laid down in Section 23 (3) of the Act and not by way of any updation. It is to avoid the applicability of the provision of Section 23 (3) and to avoid providing any explanation for delay and prejudice, that the petitioner has mischievously termed its amendment application as an updation application. The application itself reveals that it was for amendment as would be clear from paragraph 1 therein whereby the petitioner has sought a *'revision'* of the counter-claims and also from the prayer in the application whereby the petitioner has sought adjudication on the revised claims. Mr. Virmani submitted that *'revise'* is defined in Black's Law Dictionary *inter alia* to mean '*to go over a thing for the purpose of amending'*. Similarly, *'amend'* is defined to *inter alia* mean *'revise'*. He further stated that the application was nothing but clever drafting to create illusions to avoid the scrutiny under Section 23 (3) of the Act. Such actions of clever drafting creating illusions in the absence of real grounds have been frowned upon by Courts as a means resorted to abuse the process of law. Reference in this regard is made to the judgments of the Supreme Court in the cases of ***T. Aravindandam v. T. V. Satyapal, (1977) 4 SCC 467*** and ***ITC Ltd. v. Debt Recovery Appellate Tribunal, (1998) 2 SCC 70.***

31. In the initial counter-claim the petitioner specifically sought a

direction against the respondent No.1 to pay a specific amount of ₹3,150 crore. However in the amendment application the petitioner sought permission to place on record the amount revised / updated for counter-claim numbers 1, 3, 4, 7, 8, 9 and 12. Further it sought adjudication of revised amount of ₹3,531 crore instead of ₹3,150 crore. This could not have been possible without an amendment. That apart, by way of the amendment application, the petitioner has also sought amendment of various annexures to the counter-claims. This becomes evident when annexure A-1 of the original counter-claim is juxtaposed with annexure A-1 of the amendment application. While in the former, the claimed sum is of ₹5,51,60,00,000/- towards estimated value of balance work to be executed at the risk and cost of the JV. However, in the latter, this counter claim has increased to ₹6,51,66,32,774/-. Further in the amendment application, the petitioner has relied on a new annexure being annexure R-26, referable to the HCC Contract, for the first time to arrive at this figure, though no mention of this annexure was made in Annexure A-1 of the original counter-claims. Similarly, the petitioner in the amendment application has introduced for the first time item no. 6 and annexure R-27,even though the same were absent in Annexure A-1 to the original counter-claims. As a result, total amount of ₹3,86,61,81,750/- as per Annexure A-1 of the original counter-claims has increased to ₹4,96,76,31,821 in Annexure A-1 of the amendment application. The Tribunal after perusing the petitioner's application arrived at a conclusion that the amendment sought by the petitioner with respect to counter-claim no.1 changes the very nature of the counter-claim. It is for the first time that the basis

of the counter-claim no. 1 that is claim for recovery against risk and cost was sought to be changed from that of mere *'estimate'* by specifically linking it to the HCC contract. That apart, he contended that mere averment in the counter-claims that a party would reserve its rights to amend its pleadings would not confer any unfettered right to amend. Any amendment would have to be in accordance with law.

32. That apart, the Tribunal in its order dated November 03, 2016, i.e., almost 8 months after the award of the contract to HCC, has recorded that the pleadings are complete and both the parties have agreed that no further amendment of the pleadings required. The petitioner is estopped from seeking any amendment or asserting any increased counter claim, as the statement of the parties before the Tribunal is an express waiver of any such right.

33. As for the reliance placed by Ms. Acharya on the Judgment in ***Cinevistaas (supra)***, he contended that the issue therein was that of amendment and not of any updation. The petitioner cannot approbate and reprobate by stating on one hand that its application is merely seeking updation, not amendment, and on the other hand rely upon judgments that deal with amendment of pleadings.

34. He has also stated that the recourse to amendment under Section 23 (3) of the Act was not available in view of the agreement between the parties not to amend. The Tribunal on November 3, 2016 framed the point for determination wherein both parties agreed that no further amendment of pleadings will be required. This would bar any amendment in view of the opening words of Section 23 (3), i.e., *'Unless otherwise agreed by the parties…"*. It is for this reason that

the petitioner has termed its application as updation application and not amendment application.

35. He also submitted that the statement of the petitioner that the entire HCC contract was on record is false. The Tribunal *vide* order dated April 21, 2017 directed the petitioner to place on record the contract dated April 21, 2016 executed with HCC. However, as brought out in the amendment application, HCC contract was amended 11 times from September 1, 2017 to June 15, 2020. These amendments were never brought on record in the arbitration proceedings as is clear from Annexure R-26 to the petition.

36. It is his contention that the Tribunal rightly held that the application did not pass the threshold prescribed under Section 23 (3), i.e., with regard to appropriateness, delay and resultant prejudice that will be caused to the opposite party in allowing amendment. That apart, as the HCC contract was sought to be introduced for the first time by way of an amendment application, the application, if allowed, would require arbitration proceedings to start afresh from the state of pleadings and will also require leading additional evidence by the respondent No.1. This would result in making the final hearings which have taken place since January, 2021 redundant, causing grave prejudice to the respondent No.1 by delaying the process of adjudication of its claims. Therefore, allowing the amendment application would defeat the purpose of speedy resolution by arbitration.

37. That apart, he also stated that the submission of the petitioner on multiplicity of proceedings to claim amendment is misconceived, as

the present arbitration is the third arbitral reference in respect of the same contract which are separated by difference stages and timelines in the performance of the contract. The first claim / reference pertains to the period starting from November, 2006 to October 31, 2009 and is at the stage of enforcement of the arbitral award. The second claim / reference pertain to the period starting from November, 2009 to April 30, 2012 wherein arbitration proceedings have been concluded and the Tribunal therein has reserved its final award. The third claim / reference, that is an arbitration wherefrom the present issue arises, pertains to disputes arising between the parties from May 1, 2012 to December 1, 2014, i.e., the date on which the amendment Statement of Claims was filed before the Tribunal by the respondent No.1. It is the petitioner's own case that the proposed amendments were not the only ones, and it would initiate fresh arbitration once the contract given to HCC is completed. This means the petitioner itself has no intention whatsoever of avoiding multiplicity of proceedings.

38. Mr. Virmani has further stated that even assuming *arguendo* that the impugned order is an award / interim award, no grounds under Section 34 of the Act of 1996 is shown to exist to warrant interference with the same. The decision of the Tribunal cannot be faulted on the limited parameters of Section 34 and the petitioner has failed to show that there is any perversity or patent illegality in the order. He stated that it is well settled that a Court exercising jurisdiction under Section 34 does not sit in appeal over the awards passed by the Tribunal and its jurisdiction is limited to examining the impugned awards on the grounds mentioned thereunder. Further, it is submitted that while

considering a petition under Section 34 of the Act of 1996, the Court may pass interim orders as circumscribed by Section 36 (2) and (3) of the Act only. It is beyond the jurisdiction of Section 34 and Section 36 of the Act that while considering a petition under Section 34, in the interim, any interference is made with the arbitral proceedings. The Court at the stage of admission of a petition under Section 34 ought not to interfere or interdict the underlying arbitral proceedings in any manner since the scope of interim order in a petition under Section 34 can only be in the nature of orders as contemplated under Section 36 (2) and (3) of the Act. To buttress his argument, he has relied upon the judgments of the Supreme Court in the following cases:

1. ***Ssangyong Engineering and Construction Co. Ltd. (supra)***
2. ***Associate Builders (supra)***
3. ***Project Director, National Highways, No. 45E and 220, NHAI v. M. Hakeem and Anr. (2021) 9 SCC 1***

39. Further, it is his case that the judgment of the Supreme Court in ***Indian Oil Corporation Ltd.-I (supra)*** is distinguishable on the facts of this case. In that case, the first award rejected the claim of the employer, which was premised on risk and cost. Thereafter second reference was declined by the Court under Section 11 on the ground of *res judicata*. The Supreme Court held that the designate Court wrongly arrived at a conclusion that the claim of the employer therein was barred by *res judicata*. However, the said order of the Supreme Court was not on merits and therefore cannot be binding precedent as is being sought to be read by the petitioner. In the present case, the

counter-claims are not being rejected on merits. In any case, the judgments of both the Supreme Court and this Court in ***Indian Oil Corporation Limited-I and II (supra)*** would be applicable only when the petitioner demonstrates that the discharge of the respondent No. 1 was invalid and after cost of completion of the remaining contractual work has crystallised. Therefore, the judgment cannot be interpreted as permitting a belated amendment to be allowed.

40. That apart, he stated that the amendment relating to costs and interest has been disallowed by the Tribunal as it is in any way within the jurisdiction of the Tribunal. The petitioner had prayed for award of costs and pre and *pendente lite* interest on the amount sought in the counter-claim. However, by way of amendment application its sought to revise its counter-claims under these two categories of the original counter-claim. These prayers in the amendment application to revise the original counter-claims towards costs and interest were specifically disallowed by the Tribunal under its power to award costs and interest under Section 31-A and 31 (7) of the Act of 1996. He has also submitted without admitting the interpretation of Clause 63 of the Contract Agreement, that the amendment having been disallowed on the parameters laid down in Section 23 (3) of the Act of 1996, Section 63 of the contract has absolutely no bearing on the amendment sought by the petitioner.

41. He has sought dismissal of the petition.

FINDINGS

42. Having heard the learned counsel for the parties and perused the record, the first issue that needs to be decided is the maintainability

of this petition under Section 34 of the Act of 1996. This is primarily for the reason, as contended by Mr. Virmani, that the impugned order is neither an award nor an interim award in terms of Section 2(1) (c) read with Section 31 (6) of the Act. He has qualified his submission by stating that there is no final determination of the prayers sought to be raised by the petitioner in its application. The impugned order merely disallows the petitioner to amend its counter-claims, leaving it open to the petitioner to raise the same in a fresh arbitration if permissible under law.

43. On the other hand, Ms. Acharya would contest this plea by stating that the Tribunal concluded that the updation sought by way of an application was after much delay of 5 years and the liberty granted to seek fresh arbitration, shall be merely illusory.

44. Before I consider the issue of maintainability of the petition, I intend to deal with the issue whether the application filed by the petitioner is only for updation / revision and not for amendment so as to attract the provisions of Section 23 (3) of the Act of 1996. The Tribunal has concluded that the application is in fact, for amendment of the counter-claims for the reason that the amounts of the counter-claims and even the methodology for calculating such amounts have been changed. The Tribunal has also come to a conclusion that there is no concept of updation of the claims/counter-claims provided in the Act, and as such the changes sought to be made by the petitioner necessarily has to be through amendment of their counter-claims.

45. At this juncture, I may reproduce Section 23 (3) of the Act of 1996 which reads as under:

> *"(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."*

46. In substance, Section 23 (3) provides that if a party intends to amend or supplement its claims or defence, the Tribunal can consider it inappropriate to allow the same, having regard to the delay in making it. As stated above, the plea of Ms. Acharya is that by the application, the petitioner intended to update/revise the counter-claims. I am not convinced by the submissions made by Ms. Acharya. The petitioner by stating that the application is for updation/revision was primarily seeking the amendment of the counter-claims. The purpose of the petitioner seeking updation/revision is primarily to alter/change the amounts of the counter-claims. In that sense, though the application has been termed as updation application by the petitioner was in effect for amendment.

47. Mr. Virmani has contended that *Black's Law Dictionary* defines "*revise*" as "*to go over a thing for the purpose of amending*". Similarly, "*amend*" is also defined to *inter-alia* mean "*revise*". In that sense also, updation/revision shall have the effect of amending the counter-claims. In fact, I may note that while contending that updation/revision is different from amendment, Ms. Acharya has relied upon the judgments in ***Cinevistaas (supra)*** and ***Lt.Col. HS Bedi (Retd.) (supra)*** which primarily relate to the issue of amendment. In other words, she has relied upon judgments where amendments have been allowed in favour of the parties therein, in support of her case that

the application is for mere updation/revision. Needless to state, a party cannot be allowed to blow hot and cold. It is reiterated that the Tribunal was right in holding that the application filed by the petitioner was for seeking amendment of the counter-claims. If that be so, the Tribunal was within its right in the given facts to not to allow the application for updation / revision, which in effect was for amendment of the counter-claims, on the ground that the same was made belatedly.

48. Now that it is established that the application filed by the petitioner before the Tribunal was in fact for amendment of its counter-claims, I shall now answer the issue of maintainability of this petition filed under Section 34 Act of 1996. I am unable to agree with the submission made by Ms. Acharya for the simple reason that the Tribunal has only refused to allow the updation / amendment of the counter-claims primarily on the ground that updation / amendment has been sought belatedly and in terms of Section 23 (3) of the Act of 1996, which contemplates that the amendment / supplement of claim / defence can be refused on the ground of delay. That apart, the Tribunal has also rejected the application on the ground of prejudice as the proceedings are at the final arguments stage, that too of the petitioner herein. Any updation / amendment of the counter-claims would require fresh evidence to be considered, and shall result in proving the documents to be relied upon by the petitioner, which shall further delay the proceedings. It is necessary to state at this stage that the Tribunal has also held that the documents relating to execution of the contract with HCC would have to be taken on record and the respondent has to be given an opportunity to accept or deny the documents. In this

regard, Ms. Acharya has contested the said finding by stating that the contract executed by the petitioner with HCC has already been placed on record. In any case, meaningfully read the conclusion of the Tribunal that as the present arbitration proceedings are at the stage of arguments on behalf of the petitioner any further updation/amendments requiring filing of documents/adducing the evidence shall delay the proceedings.

49. The Tribunal in its order has drawn a distinction between the delay in making an application for amendment / updation as against a claim itself being barred by limitation. There is no conclusion of the Tribunal that the claims through amendment / updation shall be barred by limitation. That being the position, suffice it to state there is no final determination by the Tribunal on the merits of the claims sought to be updated/amended which would have the effect of the counter-claims being rejected on merits and which shall bar the petitioner from seeking a fresh reference to arbitration in so far as those counter-claims are concerned. Mr. Virmani contended that if the claims have not attained finality, then the impugned order of the Tribunal cannot be said to be an award or even an interim award within the ambit of the Act of 1996. In this regard, he has relied upon the judgment in ***Container Corporation of India (supra)***, rendered by this Court, wherein in paragraph 6 it was held as under:

> *"6. I consider that dismissing of an application for amendment of the written statement whereby the petitioner was not allowed to include the counter claim at a belated stage cannot be termed as an interim award so as to allow challenging such order under Section 34. The*

> *petitioner would be at liberty to assail the final award and can take all the ground of challenge as available under law as and when final award is passed by the learned Arbitral Tribunal. The petitioner cannot be allowed to challenge dismissal of its application for amendment as an interim award. One of the purposes of enactment of Arbitration & Conciliation Act, 1996 was to minimize the intervention of the courts during arbitral proceedings and that is why Section 5 of the Act prohibits the Courts from interfering in the arbitration process. The judicial intervention during arbitral proceedings is not permissible unless it is specifically provided by Part-I of the Act. The effect of non-obstantive clause in Section 5 is that the provisions of Part-I of the Act will prevail over any other law for the time being in force in India. This provision recognizes minimum role of judicial intervention in arbitral proceedings. It clearly brings out the object of the Act i.e. to minimize the judicial intervention and to encourage speedy and economic resolution of disputes by the arbitral tribunal, in case where the disputes are entered by the arbitration agreement."*

50. A similar view has been taken by a Coordinate Bench of this Court in ***MBL Infrastructure Ltd. v. RITES Ltd. & Anr., OMP (COMM) 98/2022***, decided on October 14, 2022, wherein this Court was concerned with an order dated January 8, 2022 passed by the Sole Arbitrator in proceedings relating to the disputes between the parties therein, whereby the learned Arbitrator has rejected the application filed by the petitioner therein for an amendment of the Statement of Claims on the ground of delay in seeking amendment. That apart, the Arbitrator held that the final bill which was sought to be incorporated in the claims, can be looked by him even without amendment of the

Statement of Claims. This Court was of the view that above conclusion of the learned Arbitrator cannot be construed to be a final conclusion in so far as the enhanced quantum of claims stated to have arisen from the final bill raised is concerned. The relevant observations by this Court in paragraphs 23 to 25 are reproduced as under:

> *"23. In the opinion of this court, the decision of the present case turns essentially on the following observations made by the learned Arbitrator in the impugned order:*
>
> > *"8. Apart from the above amendment, the statement of claim has been sought to be amended after para 126 and 127, wherein certain* ***new pleadings*** *have been incorporated. I have seen the same. Except for fact of Completion certificates and final bill, there are no subsequent developments and other events which were not existing at the time of filing of Statement of Claims. The amounts as well as the description of the claims as per the prayer clause have been changed.*
> >
> > * * * * * *
> >
> > *"13. Contention of the Claimant that it found necessary to amend the statement of claims after the direction by the Arbitrator & final bill placement on 29.12.2020 is not correct as Claimant had already filed the final bill on 03.02.2020. (refer para 10 above).*
> >
> > *"14. I have gone through the documents submitted as well as the judgments cited by both the parties in favour of their arguments. I am also aware that I cannot go beyond the terms & reference of the contract agreement. The main dispute relates to levy of LD and the deductions by Respondent.* ***So far as Final Bill and the amounts passed and entitlement of Claimant is concerned, the same can be looked into by me, even without the amendment in Statement of Claim****, though there is some merit in the argument of Respondent on the point that the amount of Claims cannot be changed as per Clause 25(8) of Contract. The manner of passing of the same, can always be looked into by me, without amendment of Statement of Claim.*

> *"15. In view of above, I am disallowing amendment of Statement of Claim dated 29.01.2021 by Claimant* ***with the above qualification pertaining to Final Bill due to above reasons and reason of delay****."*
>
> (emphasis supplied)

24. What clearly emerges from the foregoing observations of the learned Arbitrator is that firstly, he has unequivocally said that the petitioner's entitlement to any amounts arising from the final bill as approved by respondent No. 1 (which would take account of any deductions made by respondent No. 1) " ... can be looked into by me, even without the amendment in Statement of Claims". The learned Arbitrator has also observed that the "... manner of passing of the same, can always be looked into by me, without amendment of Statement of Claims." It is clear from these observations that the learned Arbitrator has not taken a view nor foreclosed a decision as to the amounts cleared by respondent No. 1 against the final bill raised by the petitioner, which would imply that the impugned order is not dispositive of any claims that the petitioner wishes to raise in relation to the final bill. If any doubt was to remain in this regard, the learned Arbitrator has, in so many words, qualified the dismissal of the amendment application by the following observations, which bear repetition:

> *"15. In view of above, I am disallowing amendment of Statement of Claim dated 29.01.2021 by Claimant with the above qualification pertaining to Final Bill due to above reasons and reason of delay."*

25. Accordingly, in the opinion of this court, the impugned order does not comprise a final determination of any of the petitioner's claims, including the enhanced quantum of claims stated to have arisen from the final bill raised upon respondent No. 1. The impugned order is accordingly not an interim award; and is not amenable to challenge under section 34 of the A&C Act."

51. Similarly, another Coordinate Bench of this Court in the case

of ***Punita Bhardwaj v. Rashmi Juneja in OMP 20/2019*** decided on August 31, 2022, was concerned with an order passed by an Arbitrator on November 4, 2019, whereby the Arbitrator decided an application for amendment of the Statement of Claims sought by the petitioner/claimant. The Arbitrator *vide* order dated November 4, 2019, had stated the following:

> *"10. The first of these judgments in point of time is the judgment in Container Corporation, wherein this Court held as follows:-*
>
> > *"3. A perusal of the order dated 1st May 2009 passed by the learned Arbitral Tribunal shows that the Tribunal dismissed the application for amendment of written statement on the ground that it was made at the stage when the final arguments were being addressed before the Tribunal. The claimant had already concluded its arguments and the respondent had partly argued the matter and the matter was posted for hearing of remaining arguments on 28th April 2009 when it could not be taken up and was posted on 1st May 2009 when an application under Section 23 of the Act was filed by the petitioner for amendment of written statement so as to include a counter claim. The Tribunal dismissed the application having regard to the gross delay in making application and did not consider it appropriate to allow the prayer made in the application.*
> >
> > *4. The Arbitral Tribunal has wide discretion to allow or dismiss applications for amendment of claim or written statement filed before it during the proceedings. There is no provision under the Act for approaching the Court against an order of allowing or dismissing the amendment application. The issue pressed for by petitioner is whether dismissing of an application of amendment of the written statement so as to include the counter claim amounts to giving an interim award*

which can be challenged under Section 34.

5. An interim award is in the nature of a decision of the Arbitral Tribunal on some of the claims of the parties. Occasionally, the Arbitral Tribunal is called upon to give a part award particularly when a part of the claim of the claimant stands admitted by the opposite party either in the pleading or otherwise. The act does not define an interim award. Section 2 (c) of the Act, however provides that an arbitral award included an interim award. Generally an interim award is like a preliminary decree within the meaning of Section 2(2) of the Civil Procedure Code or it is like a decree based on the admissions of parties as envisaged under Order 12 Rule 6 CPC. However, in any case, an interim award must make a provisional arrangement by the Arbitral Tribunal during the proceedings pending before it, but before passing the final award.

6. I consider that ***dismissing of an application for amendment of the written statement whereby the petitioner was not allowed to include the counter claim at a belated stage cannot be termed as an interim award so as to allow challenging such order under Section 34****. The petitioner would be at liberty to assail the final award and can take all the ground of challenge as available under law as and when final award is passed by the learned Arbitral Tribunal. The petitioner cannot be allowed to challenge dismissal of its application for amendment as an interim award.* ***One of the purposes of enactment of Arbitration & Conciliation Act, 1996 was to minimize the intervention of the courts during arbitral proceedings and that is why Section 5 of the Act prohibits the Courts from interfering in the arbitration process****. The judicial intervention during arbitral proceedings is not permissible unless it is specifically provided by Part-I of the Act. The effect of non-obstantive clause in Section 5 is that the provisions of Part-I of the Act will prevail over any other law for the time being in force in*

> *India. This provision recognizes minimum role of judicial intervention in arbitral proceedings. It clearly brings out the object of the Act i.e. to minimize the judicial intervention and to encourage speedy and economic resolution of disputes by the arbitral tribunal, in case where the disputes are entered by the arbitration agreement."*[13]

11. Turning to the two judgments cited by Mr. Singla, the petitions under Section 34 of the Act were held to be maintainable against dismissal of applications for amendment of the statement of claims (in M/s Cinevistaas[14]*) and of the statement of defence (in Lt. Col. H.S. Bedi Retd.*[15]*).*

12. As far as maintainability is concerned, this Court in M/s Cinevistaas16 noticed that the impugned order rejected amendment of certain claims on the ground that they were barred by limitation, and observed as follows:-

> *"22. The question that then arises is whether the order of the Ld. Arbitrator constitutes an 'Award'. Under Section 2(1)(c), an award includes an 'interim award'.* ***Whether the impugned order in the present case constitutes an interim award or not is to be decided by seeing the nature of the order and not the title of the application****, which was decided. The order, in fact, rejects the proposed amendments in claim nos. V and VI, by holding that the same are barred by limitation.* ***Insofar as the difference between the newly claimed amounts and the earlier claimed amounts are concerned, this is a final adjudication. There is a finality attached to the award*** *and there is nothing in the final award that would be dealing with these claims. It is not just an interim award, but a rejection of the additional claims/amounts finally.*
>
> *23.* ***The order is not to be construed as a mere procedural order or an order rejecting a technical amendment, but in fact a rejection of substantive claims.*** *Amendments can be of several kinds. They can range from mere amendment of cause title, addition/deletion of few paragraphs, correction of*

> *errors, addition of new claims, correction of existing claims, etc. Every amendment is not to be treated in the same manner. The question in every case of amendment is as to whether it decides a substantive issue….."17*
>
> *13. The Court relied upon the judgment of the Supreme Court in Shah Babulal Khimji vs. Jayaben D. Kania & Anr.18, which distinguished between an adjudication which conclusively determines a claim and has the "characteristics and trappings of finality", thus giving it the characteristics of a "judgment", and those interlocutory orders which do not partake of these characteristics. The Court also noticed the judgment in India Farmers Fertilizer Cooperative Limited vs. Bhadra Products19, wherein the Supreme Court had occasion to consider the characteristics of an "interim award" and held that the interim award must conclusively determine some of the issues between the parties".*

52. This Court, considering the above order of the Arbitrator, has in paragraphs 18 to 21 of the judgment held as under:

> *"18. The three judgments of this Court cited by learned counsel for the parties must be read in the context of this provision. The statute clearly vests discretion in the arbitral tribunal to disallow a party to amend or supplement its pleadings on the ground that the application is belated. In Container Corporation25, the amendment was rejected by the arbitral tribunal on this ground and the challenge under Section 34 of the Act was held not to be maintainable. In M/s Cinevistaas26 and Lt. Col. H.S. Bedi Retd.27 on the other hand, the Court came to the conclusion that the rejection of the amendments were in the nature of final adjudication of the claims and defences proposed to be raised. It is this factor which clothed the orders of the tribunal with the characteristic of finality and rendered them susceptible to challenge as interim awards. This distinction, in my view, is the key to determining the maintainability of the present petition.*
>
> *19. In the facts of the present case, the learned arbitrator has*

> *proceeded only on the ground that the amendment was sought belatedly. Paragraphs 12 and 13 of the impugned order make this position clear, and in fact, in paragraph 13, the learned arbitrator has stated that "expression of any view herein before will not be treated as expression on the merit of the case".*
>
> *20. Further, it is evident that the suit was filed before this Court as far back in 2014 and referred to arbitration in the year 2016. The application for amendment was filed by the petitioner only on 21.07.2017. Even thereafter, it is recorded by the learned arbitrator that the matter proceeded without the petitioner seeking an adjudication of the said application until 04.11.2019, when the impugned order was passed. In the meanwhile, proceedings continued before the learned arbitrator, and issues appear to have been framed in these proceedings on 17.05.2018.28 During the pendency of the present petition before this Court also, I am informed that the parties have proceeded to lead evidence before the learned arbitrator and the proceedings are now at the stage of final arguments.*
>
> *21. In view of the aforesaid position, I am of the view that the impugned order in the present case does not constitute an interim award, susceptible to challenge under Section 34 of the Act. The petition is, therefore, dismissed as not maintainable, leaving it open to the parties to take such remedies as may be available to them in accordance with law."*

53. Ms. Acharya in support of her submission has relied upon the judgment in the case of ***Cinevistaas (supra)***. Suffice to state that the said judgment has no applicability to the facts of this case inasmuch as this Court while considering Section 34 petition has *inter alia* with regard to the question whether the order of the Arbitrator is an interim order which can be appealed against in this Court, held that the decision whether the order is an award or an interim award is to be

made based on the nature of the order and not the title of the application. In that case, the Court set aside the Arbitrator's rejection of the proposed amendment, by holding that the same were barred by limitation and as such is a final adjudication. In so far as the additional amounts that were sought to be claimed are concerned, as an element of finality has been attached to the award, the Court in those factual circumstances held that the petition under Section 34 of the Act of 1996 is maintainable.

54. The facts in ***Cinevastaas (supra)*** and the facts herein as demonstrated above are at variance, inasmuch in the present case, the Tribunal has only rejected the application for amendment on the ground that the same has been made after a long lapse of time. In fact, it has granted liberty to the petitioner herein to invoke a fresh arbitration insofar as the claims sought to be put forth through the application are concerned. Surely, the petitioner shall be at liberty to take all pleas on the maintainability of the claims in such arbitration. In fact, from paragraph 7.20 of the impugned order, it can be seen that the Tribunal has refrained itself from going into the issue of limitation and waiver. In other words, the issue of limitation with regard to the merits of the updation / amendment sought by the petitioner has not been adverted to by the Tribunal at all. If that be so, it cannot be said that such claims of the petitioner have been decided finally, and as such the impugned order does not fulfill the requirements of an award or an interim award under the Act of 1996. So the impugned order not having the nature of an interim award, this Court is of the view that the petition under Section 34 shall not be maintainable.

55. Insofar as the judgments in ***Farmers Fertilizer Co-operative Limited (supra)*** and ***Lt. Col. H.S. Bedi (Retd) and Anr. (supra)*** as relied upon by Ms. Acharya are concerned, the said judgments are distinguishable in the facts, as in those cases, the impugned orders finally determined the amendments sought by the parties, *inter-alia* on the ground of limitation, and as such are not applicable for the purpose of determining the present issue.

56. The decision in ***A.K. Gupta and Sons (supra)*** has been relied upon by Ms. Acharya to contend that if an amendment does not add on to the facts already on record, such an amendment would be allowed even after the statutory period of limitation. She had also referred to the judgment in ***K.K. Scaria (supra)*** wherein the High Court of Kerala had held the power to allow amendment is considerably wide under Section 23(3) of the Act of 1996 and is not circumscribed as in the case of a suit by provisions of CPC. Surely, given the fact that the Tribunal in this case has exercised its jurisdiction and was of the view that allowing any amendment would further delay the proceedings, the said judgments would not come to the aid of the petitioner.

57. As this Court has only considered the maintainability of the petition, the reliance placed by Ms. Acharya on the judgments in ***Dhannalal (supra)*** and ***Gammon India (supra)*** to contend that to avoid multiplicity of litigation, the amendment would have been allowed, has become inconsequential. She has also relied upon the judgments in the cases of ***Shree Ganesh Petroleum Rajgurunagar (supra), Associate Builders (supra)*** and ***Ssangyong Engineering and Construction Company Ltd. (supra)*** which relate to the scope of

interference of Courts with an arbitral award in a petition under Section 34 of the Act of 1996. Similarly, the judgments of the Supreme Court and this Court in ***Indian Oil Corporation Ltd.-I and II (supra),*** has also been relied upon to buttress the submission that the JV is not discharged from its liability even after the contract is terminated and the work is awarded to a third party. In light of my finding that the present petition under Section 34 of the Act of 1996 is not maintainable, these judgments also would have no applicability.

58. In view of my above conclusion, the present petition and connected application are dismissed. No costs.

V. KAMESWAR RAO, J

MARCH 27, 2023*/jg*