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

Reserved on : 19th December, 2018
Date of decision : 12th February, 2019

\+ **O.M.P. (COMM) 31/2017 & I.A. 13479/2018**

M/S CINEVISTAAS LTD. ..... Petitioner

Through: Mr. Dinesh Agnani, Senior Advocate with Mr. P.K. Bansal, Advocate (M-9810925670)

versus

M/S PRASAR BHARTI ..... Respondent

Through: Mr. Rajeev Sharma, Mr. Saket Chandra & Mr. T. Rajat Krishna, Advocates (M-8130881262)

CORAM:
JUSTICE PRATHIBA M. SINGH

JUDGMENT

Prathiba M. Singh, J.

I.A. 13479/2018 (for restoration)

1. This is an application seeking restoration of OMP(COMM) 31/2017 which was dismissed for non-prosecution on 7th September, 2018. For the reasons stated in the application, OMP(COMM) 31/2017. Accordingly, I.A. is allowed.

O.M.P. (COMM) 31/2017

2. The present petition under Section 34 of the Arbitration and Conciliation Act, 1996 (*hereinafter, 'Act'*) has been filed challenging order dated 8th August, 2009 passed by the Ld. Arbitrator. The said order rejects the prayer for amendment of the Statement of claim, filed by Petitioner - M/s Cinevistaas Ltd. (*hereinafter 'Petitioner'*) in the arbitration proceedings pending with Prasar Bharati (*hereinafter 'Respondent'*).

3. Brief background leading to the present petition is that the Petitioner had undertaken production of a game show titled *"Knock Out"*. The concept of this programme was duly approved by the Respondent. After approval was granted, there was exchange of commercial terms, and finally on 15th November, 2000, the Respondent approved telecast of 26 episodes of the said game show. The Petitioner was asked to submit Bank Guarantees, which was also done. After further negotiations, the Respondent approved telecast of 52 episodes of the programme and the final telecast date was decided as 28th January, 2001. Just three weeks before the telecast had to take place, some queries were raised by the Respondent. Television promos were aired and advertisements were also published. However, on 27th December, 2000, the Respondent informed the Petitioner that the show would not be aired.

4. A writ petition was filed by the Petitioner challenging the decision of the Respondent. Some interim orders were passed. On 31st October, 2003, the Petitioner issued notice of arbitration. The writ petition was thereafter withdrawn on 24th November, 2003.

5. The Petitioner sought appointment of an independent Arbitrator by filing a Section 11 petition and on 7th May, 2004, a Sole Arbitrator was appointed. Petitioner then filed its statement of claims. While the arbitral proceedings were pending, the Petitioner realised that there were substantial errors in the quantification and details in two claims. i.e., claim nos. V and VI. The Petitioner moved an application seeking permission to correct the said claims. The said application was dismissed on 8th August, 2009.

6. The present petition challenges the said order of dismissal. Before recording the submissions of parties, the order passed by the Ld. Arbitrator,

deserves to be reproduced as there is a dispute raised as to the nature of the order i.e., whether it is, in fact, an award at all, which can be challenged in a Section 34 petition. The order dated 8th August, 2009 reads as under:

> "*1. By this order application dated 9.2.2008 (filed on 25.5.2008) of the Claimant seeking amendments in its statement of claims dated 31.8.2004 by adding additional claims in its claims no. V and VI is being disposed off.*
> *2. Claimant in its statement of claims has made claims on various counts under 11 claims. All these claims have been disputed/refuted by the respondent.*
> *3. In claim no. V, Rs.8,40,000/- with Rs.13,56,000/- interest @ 18% p.a. and in claim no. VI, a sum of Rs.15,50,000/- with Rs. 9,53,250/- as interest @ 18% p.a. had been claimed earlier. Claimant now wants to increase both these claims to raise claims:-*
>
> *Claim no. V to Rs.65,07,578/- and interest Rs.13,56,000/- and*
> *Claim no. VI to Rs.34,47,000/- and interest Rs.21,19,905/-*
> *As a result the total claims would increase to Rs.77,01,97,260/- including interest upto 31st August 2004.*
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> *4. The grounds for this amendment are that these additional claims had been taken in the letter of invocation of arbitration and also in the petition under section 11 of the Arbitration and Conciliation Act, 1956 (for short 'the Act'). But had been inadvertently left out.*
> *5. Respondent in reply/opposition is contesting this amendment, inter-alia, on the pleas that these claims were given up and can not be raised now, application is highly belated filed after 54 months, these claims are time barred, the application is malafide, abuse of the process of law and in not maintainable.*
> *6. Oral submissions had been addressed at length. Though the counsel for both the parties had desired to*

supplement with written submissions but none has been filed till today after expiry of about 1 month of the specified date.

7. Considered the pleadings, documents and submissions made on behalf of the parties.

8. It is not disputed on behalf of the respondent that the additional pleas sought to be added had been incorporated in the invocation letter dated 31.10.2003 as well as in petition u/s 11 of the Act.

9. In my view this application can be disposed off on the ground of limitation itself. Learned counsel for claimant has contended that the question of limitation could be gone into during trial and can not be raised/considered at this stage; whereas learned counsel for the respondent has contended that the Act is intended to avoid/curtail delays in arbitration matters and patently the claims sought to be raised now are not only time barred but also raised highly belatedly. He has relied on Kanailal & Anr. Vs. Jiban Kanal Das & Anr. – AIR 1977 Cal 189 (DB).

10. The Act has been enacted in replacement of old Act of 1940 with the avowed object of eliminating delays and for expeditious trial of arbitration matters. Frivolous and legally untenable pleas are to be discouraged.

11. Section 43 (1) and (2) and Section 21 of the Act read as under:-

> *43. **Limitation** – (1) The Limitation Act, 1963 (36 of 1963), shall apply to arbitrations as it applies to proceedings in court.*
>
> *(2) For the purpose of this Section and The Limitation Act, 1963 (36 of 1963), an arbitration shall be deemed to have commenced on the date referred to in section 21.*
>
> *(3) X X X*
>
> *(4) X X X*
>
> *Section 21 – **Commencement of arbitral proceedings** – Unless otherwise agreed by the*

parties, the arbitral proceedings in respect of a particular dispute commence on the date on which a request for that dispute to be referred to arbitration is received by the Respondent.

12. In Panchu Gopal Bose vs. Board of Trustees for the Port of Calcutta, AIR 1994 (SC) 1615 after referring to case law, construing section 37 of the 1940 Act which contains provisions similar to those of present sections 43 and 21, it has been observed as under:

"The period of limitation for commencing an arbitration runs from the date on which the cause of arbitration accrued, that is to say, from the date when the claimant first acquired either a right of action or a right to require that an arbitration takes place upon the dispute concerned.

Therefore, the period of limitation for the commencement of an arbitration runs from the date on which, had there been no arbitration clause, the cause of action would have accrued. Just as in the case of civil actions the claim is not to be brought after the expiration of a specified number of years from the date on which the cause of action accrued, so in the case of arbitrations, the claim is not to be put forward after the expiration of the specified number of years from the date when the claim accrued."

13. This legal position has been reiterated in State of Orissa Vs. Damodar Das AIR 1996 SC 942.

14. In the present case, the case of the claimant is that an agreement had been arrived at between the parties but its breach has been committed by the respondent by backing out of it vide letter dated 27.12.2000. Claimant had made representations against it but to no effect.

15. Claimant had invoked arbitration clause in its notice dated 31.10.2003 and thereafter on its petition

under section 11, the Arbitrator has been appointed. This notice was served on the respondent on 4.11.2003.

16. The period of limitation for the claims in the present case is 3 years under the Limitation Act 1963 which would start from the date when the agreement was beached or in any case when notice of invocation was served on the respondent and 3 years period would be counted from the date when the cause of action accrued.

17. The statement of claims was made on 31.8.2004. But the present application seeking addition/increase by amendment in claims 5 and 6 has been made on 25.5.2008. These additional claims are sought to be raised long after the expiry of period of limitation of 3 years and thus would be barred by limitation on 25.5.2008.

18. These additional claims would be liable to be dismissed under section 3 of the Limitation Act of 1963. It will be a futile exercise to allow this application now and unnecessarily drag the matter by allowing the application. No doubt where bonafide issue arises which need trial amendment could be allowed in a case where there are special circumstances. There are no special circumstances in this case.

19. For the reasons given above, this application for amendment is dismissed. In the circumstances of the case parties are left to bear their own costs."

7. Mr. Dinesh Agnani, learned Senior Advocate appearing for the Petitioner submits that the Petitioner merely sought correction of errors in the claim petition in claim nos. V and VI. According to him, while preparing the matter, it was noticed that the claims were wrongly quantified. The fact, that it was only an error is clear from a perusal of the arbitration notice dated 31st October, 2003, where the claims were duly quantified. He submits that

this notice invoking arbitration gave the correct claims and quantification thereof, and it was only due to an inadvertent error that the claim petition had given the wrong quantification. He submits that the application moved was merely for correction of the errors, and the same ought to have been allowed by the Ld. Arbitrator. It is further submitted that the Ld. Arbitrator has not merely rejected the application but has, in fact, held that the additional claims raised in the application are time barred. Thus, there has been a final rejection of the additional amounts/claims. It is, thus, submitted that the order is in the nature of an award. He relies upon the following judgments:

- ***Jhang Cooperative Group Housing Society Ltd. v. Pt. Munshi Ram and Associates Pvt. Ltd 2014 (1) R.A.J. 252 (Del);***
- ***Aspire Investments Pvt. Ltd. v. Nexgen Edusolutions Pvt. Ltd. 2016 (1) R.A.J. 245;***
- ***Indian Farmers Fertilizer Cooperative Ltd. v. Bhadra Products 2018 (1) ArbLR 271*** *(hereinafter, 'Bhadra Products').*

8. On the other hand, Mr. Rajeev Sharma, ld. counsel appearing for Respondent submits that the application moved by the Petitioner was in the nature of an amendment to the claim statement. It is argued that since the claim petition had sought a lesser amount than what was stated in the invocation letter, it ought to be held that the Petitioner had, in fact, given up other claims. It is further submitted that the rejection of amendment of the claim petition does not constitute an award, and is not challengeable under Section 34 of the Act. It is further urged that the amendments sought having been rejected the same cannot be construed as additional claims at all, in the first place. If they cannot be construed as additional claims, there can be no

final rejection of the same. Mr. Sharma relies on the following judgments:

- ***Container Cooperation of India v. Taxmaco Ltd. 2009 SCC OnLine Del 1594*** *(hereinafter, 'Container Cooperation')****;***
- ***Shyam Telecom Ltd. v. Icomm Ltd. [OMP 1606 of 2001 decision dated 19th March, 2010]*** *(hereinafter, 'Shyam Telecom')****;***
- ***Punj Lloyd Ltd. v. ONGC [Arb.P. 1737 of 2015 decision dated 16th March, 2016]*** *(hereinafter, 'Punj Lloyd v. ONGC')****;***
- ***Centrograde Minerals and Metal Inc v. Hindustan Cooper Limited (2017) 2 SCC 228;***
- ***National Highways Authority of India v. NCC-VEE (JV) [OMP(Comm) 149 of 2017 decision dated 12th April, 2018]***

9. It is submitted, without prejudice, by the Respondent that even if the order is considered to be an award, it does not warrant any interference, as the additional claims were raised 54 months after filing of the claims i.e. more than 4 years. The amendment is not merely in quantification but is much more detailed and thus, the attempt is to enhance and raise claims, which have already been given up.

Analysis & Findings

10. Before going into the nature of the order, the claims and the amendments/corrections sought, need to be considered. Claim no.V was a claim relating to expenses incurred towards concept development and research scripting. The claim is titled as under:

> "***CLAIM No.V****: Loss suffered by the claimant of Rs.8,40,000/- along with interest @ Rs.18% per annum (Calculated w.e.f. 1.4.2001 till 31.8.2004) amounting to Rs.5,16,600/- on account of expenses incurred towards concept development and research scripting.*"

11. Under this claim, the Petitioner gave the details of four persons, who were retained as professionals and claimed a total amount of Rs.8,40,000/-.

12. In the amendment, under the same head, Petitioner sought to add further persons, who were engaged as professionals and sought to change the claimed amount from Rs.8,40,000/- to Rs.65,01,518/-. The individuals sought to be added were the Art Director, Creative Director, Research Head and Coordinator, Marketing Head, Development Head, Writer and Research Consultant. The Petitioner also sought to add transportation charges, equipment hire charges and various other charges. The corrections sought in the claim in terms of quantification read as under:

> "*In view of the above, the total amount in para (v) a sum of Rs.8,40,000/- is to be substituted by a sum of Rs.65,01,518 consequently the interest amount of Rs.13,56,000/- is also to be replaced by sum of Rs.39,98,433/-*"

13. Claim no.VI is titled as under:

> "***CLAIM NO.VI*** *: Loss suffered by the claimant of Rs.15,50,000/- along with interest @ Rs.18% per annum (Calculated w.e.f. 1.4.2001 till 31.8.2004) amounting to Rs.9,53,250/- on account of expenses incurred towards Technicians.*"

14. Under this claim, the expenses incurred towards technicians were sought to be added. The same were quantified at Rs.15,50,000/- for six individuals including Director, Cameraman, etc, in the statement of claim. This was sought to be increased to Rs.34,47,000/- by adding six more technicians namely Writer/Director for Ads, Editor, Senior Production Chief, Supervising Director, Senior Supervising Director and Floor

Maintenance In-Charge. The claim itself was sought to be modified as under:

> "*In view of the above, the total amount in para (vi) a sum of Rs.Rs.15,50,000/- is to be replaced by a sum of Rs. 34,47,000/-. Consequently the interest amount of Rs.9,53,250/- is also to be replaced by sum of Rs.21,19,905/-.*"

15. The total claimed amount, therefore, was sought to be enhanced from Rs.75,88,29,654/- including interest upto 31st August, 2004 to a sum of Rs.77,01,97,260/-.

16. The Ld. Arbitrator considers the application and holds that the changes sought to be made constitute additional claims. Thereafter, it is held that since these are additional claims and the notice invoking arbitration was issued on 4th November, 2003, the incorporation of these additional claims, being beyond 3 years, was barred by limitation as on 25th May, 2008. The Ld. Arbitrator further holds that there are no special circumstances to allow the additional claims.

17. The question, that arises is whether these were inadvertent errors which were left out in the statement of claims, or were they additional claims. A perusal of the letter invoking arbitration issued on 31st October, 2003 shows that the said letter had, in fact, quantified all the claims. Claim under concept development, research and scripting was quantified at Rs.64,25,000/-, however, in the claim petition, claim is quantified as Rs.8,40,000/-.

18. The claim in respect of the technicians is quantified in the letter invoking arbitration at Rs.34,47,000/- whereas in the claim petition it is quantified as Rs.15,50,000. The letter invoking arbitration having quantified

the claim at a higher amount, the same cannot be held to be barred by limitation. Even in the application under Section 11 of the Act, seeking appointment of an Arbitrator, the quantification of the claims is identical to the letter invoking arbitration. The claims were raised, invoked and referred to arbitration. The finding of the Ld. Arbitrator, that these are additional claims, is thus not tenable. The claims in respect of the expenses had been raised at the earliest point of time. Even in the writ petition, which was filed challenging the decision of the Respondent, the Petitioner had clearly contended that it had incurred more than Rs.6 crores as expenses. Thus, contemporaneously, claim nos. V and VI were always treated by the Petitioner as being for the sums of Rs.65 lakhs and Rs.34 lakhs respectively.

19. The finding of the Ld. Arbitrator, that in order to eliminate delays, frivolous and untenable pleas are to be discouraged, is not substantiated from the records in the present case.

20. The law relating to amendments is very clear i.e., that the Court has to be very liberal while considering amendments. This would equally apply to arbitral proceedings, which are not bound by the strict provisions of CPC. The Ld. Arbitrator records that the claims were contained in the invocation letter while observing as under:

> "*8. It is not disputed on behalf of the respondent that the additional pleas sought to be added had been incorporated in the invocation letter dated 31.10.2003 as well as in petition u/s 11 of the Act.*"

21. After having noticed the fact that the additional claims now raised, were contained in the invocation letter, as also in the Section 11 petition, there was no reason why the same ought not to have been allowed, by the

Ld. Arbitrator.

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. In ***Shah Babulal Khimji v. Jayaben D. Kania & Anr. (1981) 4 SCC 8*** *(hereinafter, 'Shah Babulal Khimji')*, the Supreme Court has observed as under:

> *"**113.** Thus, under the Code of Civil Procedure, a judgment consists of the reasons and grounds for a decree passed by a court. As a judgment constitutes the reasons for the decree it follows as a matter of course that the judgment must be a formal adjudication which conclusively determines the rights of the parties with regard to all or any of the matters in controversy. The*

concept of a judgment as defined by the Code of Civil Procedure seems to be rather narrow and the limitations engrafted by sub-section (2) of Section 2 cannot be physically imported into the definition of the word "judgment" as used in clause 15 of the letters patent because the letters patent has advisedly not used the terms "order" or "decree" anywhere. The intention, therefore, of the givers of the letters patent was that the word "judgment" should receive a much wider and more liberal interpretation than the word "judgment" used in the Code of Civil Procedure. At the same time, it cannot be said that any order passed by a trial Judge would amount to a judgment; otherwise there will be no end to the number of orders which would be appealable under the letters patent. It seems to us that the word "judgment" has undoubtedly a concept of finality in a broader and not a narrower sense. In other words, a judgment can be of three kinds:

(1) A final judgment.— A judgment which decides all the questions or issues in controversy so far as the trial Judge is concerned and leaves nothing else to be decided. This would mean that by virtue of the judgment, the suit or action brought by the plaintiff is dismissed or decreed in part or in full. Such an order passed by the trial Judge indisputably and unquestionably is a judgment within the meaning of the letters patent and even amounts to a decree so that an appeal would lie from such a judgment to a Division Bench.

(2) A preliminary judgment.—This kind of a judgment may take two forms—(a) where the trial Judge by an order dismisses the suit without going into the merits of the suit but only on a preliminary objection raised by the defendant or the party opposing on the ground that the suit is not maintainable. Here also, as the suit is finally decided one way or the other, the order passed by

the trial Judge would be a judgment finally deciding the cause so far as the Trial Judge is concerned and therefore appealable to the larger Bench. (b) Another shape which a preliminary judgment may take is that where the trial Judge passes an order after hearing the preliminary objections raised by the defendant relating to maintainability of the suit, e.g., bar of jurisdiction, res judicata, a manifest defect in the suit, absence of notice under Section 80 and the like, and these objections are decided by the trial Judge against the defendant, the suit is not terminated but continues and has to be tried on merits but the order of the trial Judge rejecting the objections doubtless adversely affects a valuable right of the defendant who, if his objections are valid, is entitled to get the suit dismissed on preliminary grounds. Thus, such an order even though it keeps the suit alive, undoubtedly decides an important aspect of the trial which affects a vital right of the defendant and must, therefore,be construed to be a judgment so as to be appealable to a larger Bench.

(3) Intermediary or interlocutory judgment.— Most of the interlocutory orders which contain the quality of finality are clearly specified in clauses (a) to (w) of Order 43 Rule 1 and have already been held by us to be judgments within the meaning of the letters patent and, therefore, appealable. There may also be interlocutory orders which are not covered by Order 43 Rule 1 but which also possess the characteristics and trappings of finality in that, the orders may adversely affect a valuable right of the party or decide an important aspect of the trial in an ancillary proceeding. Before such an order can be a judgment the adverse effect on the party concerned must be direct and immediate rather than indirect or remote. For instance, where the trial Judge in a suit under Order 37 of the Code of Civil Procedure

refuses the defendant leave to defend the suit, the order directly affects the defendant because he loses a valuable right to defend the suit and his remedy is confined only to contest the plaintiff's case on his own evidence without being given a chance to rebut that evidence. As such an order vitally affects a valuable right of the defendant it will undoubtedly be treated as a judgment within the meaning of the letters patent so as to be appealable to a larger Bench. Take the converse case in a similar suit where the trial Judge allows the defendant to defend the suit in which case although the plaintiff is adversely affected but the damage or prejudice caused to him is not direct or immediate but of a minimal nature and rather too remote because the plaintiff still possesses his full right to show that the defence is false and succeed in the suit. Thus, such an order passed by the trial Judge would not amount to a judgment within the meaning of clause 15 of the letters patent but will be purely an interlocutory order. Similarly, suppose the trial Judge passes an order setting aside an ex parte decree against the defendant, which is not appealable under any of the clauses of Order 43 Rule 1 though an order rejecting an application to set aside the decree passed ex parte falls within Order 43 Rule 1 clause (d) and is appealable, the serious question that arises is whether or not the order first mentioned is a judgment within the meaning of letters patent. The fact, however, remains that the order setting aside the ex parte decree puts the defendant to a great advantage and works serious injustice to the plaintiff because as a consequence of the order, the plaintiff has now to contest the suit and is deprived of the fruits of the decree passed in his favour. In these circumstances, therefore, the order passed by the trial Judge setting aside the ex parte decree vitally affects the valuable

rights of the plaintiff and hence amounts to an interlocutory judgment and is therefore, appealable to a larger Bench.

114. *In the course of the trial, the trial Judge may pass a number of orders whereby some of the various steps to be taken by the parties in prosecution of the suit may be of a routine nature while other orders may cause some inconvenience to one party or the other, e.g., an order refusing an adjournment, an order refusing to summon an additional witness or documents, an order refusing to condone delay in filing documents, after the first date of hearing an order of costs to one of the parties for its default or an order exercising discretion in respect of a procedural matter against one party or the other. Such orders are purely interlocutory and cannot constitute judgments because it will always be open to the aggrieved party to make a grievance of the order passed against the party concerned in the appeal against the final judgment passed by the trial Judge.*

115. *Thus, in other words every interlocutory order cannot be regarded as a judgment but only those orders would be judgments which decide matters of moment or affect vital and valuable rights of the parties and which work serious injustice to the party concerned. Similarly, orders passed by the trial Judge deciding question of admissibility or relevancy of a document also cannot be treated as judgments because the grievance on this score can be corrected by the appellate court in appeal against the final judgment.*

116. *We might give another instance of an interlocutory order which amounts to an exercise of discretion and which may yet amount to a judgment within the meaning of the letters patent. Suppose the trial Judge allows the plaintiff to amend his plaint or include a cause of action or a relief as a result of*

which a vested right of limitation accrued to the defendant is taken away and rendered nugatory. It is manifest that in such cases, although the order passed by the trial Judge is purely discretionary and interlocutory, it causes gross injustice to the defendant who is deprived of a valuable right of defence to the suit. Such an order, therefore, though interlocutory in nature contains the attributes and characteristics of finality and must be treated as a judgment within the meaning of the letters patent. This is what was held by this Court in Shanti Kumar case [(1974) 2 SCC 387 : AIR 1974 SC 1719 : (1975) 1 SCR 550] , as discussed above.

117. *Let us take another instance of a similar order which may not amount to a judgment. Suppose, the trial Judge allows the plaintiff to amend the plaint by adding a particular relief or taking an additional ground which may be inconsistent with the pleas taken by him but is not barred by limitation and does not work serious injustice to the defendant who would have ample opportunity to disprove the amended plea taken by plaintiff at the trial. In such cases, the order of the trial Judge would only be a simple interlocutory order without containing any quality of finality and would therefore not be a judgment within the meaning of clause 15 of the letters patent.*

122. *We have by way of sample laid down various illustrative examples of an order which may amount to judgment but it is not possible to give such an exhaustive list as may cover all possible cases. Law with its dynamism, pragmatism and vastness is such a large ocean that it is well-nigh impossible for us to envisage or provide for every possible contingency or situation so as to evolve a device or frame an exhaustive formula or strategy to confine and incarcerate the same in a strait-jacket. We, however,*

> *hope and trust that by and large the controversy raging for about a century on the connotation of the term "judgment" would have now been settled and a few cases which may have been left out, would undoubtedly be decided by the court concerned in the light of the tests, observations and principles enunciated by us."*
> *"*

24. The Supreme Court in the above judgment distinguishes between a final judgment, preliminary judgment and an intermediary or interlocutory judgment. If there is "*formal adjudication which conclusively determines"*, it would be a judgment. A final judgment would either `*dismiss or decree in part or in full*'. Preliminary judgments are those that decide finally, preliminary issues such as jurisdiction, *res judicata*, etc. Interlocutory judgments are enumerated in Order XLIII Rule 1. Apart from those enumerated in the CPC, such judgments would include those which possess *"characteristics and trappings of finality"*. If a *"valuable right"* is lost, it would be an interlocutory judgment. If the order is *"routine in nature"*, it would not constitute a judgment. Allowing an amendment which takes away a vested right of the Defendant, would constitute a judgment.

25. A similar distinction, as has been drawn in ***Shah Babulal Khimji (supra)*** between an *'order'* and a *'judgment'*, would have to be drawn even in arbitration proceedings while construing the term `*award'* or `*interim award'*. <u>While technical, procedural and other amendments, which may be allowed or rejected, can be challenged along with the final award, the rejection of a substantive claim cannot be held to be non-challengeable</u>.

26. It is indeed surprising that the Petitioner sought to name the application for amendment as an application for correction of typographical

errors. There is no doubt that the Petitioner committed serious errors in the initial claim petition while quantifying the expenses. The manner, in which the new claim nos. V & VI have been explained in the application, clearly shows that the details of various expenses have been spelt out. The names of various persons and technicians have been mentioned, including actors. The question as to whether these expenses were actually incurred or not, is not to be tested at the stage of considering the application for correction/amendment. The proof of these expenses would have to be adduced by the Petitioner in the arbitral proceedings. It cannot, however, be said, at this stage, that these expenses were not incurred or were given up. Advertisements and promos in respect of the show had, in fact, been aired/published. The fact, as to whether these personnel were engaged or not, is easily verifiable by the Arbitral Tribunal. What is, however, clear is that the claims were clearly not bogus. The order rejecting the application by holding that the claims are barred by limitation, thus constitutes an award under the Act.

27. The question as to what constitutes an *'interim award'* was settled by a recent judgment of the Supreme Court in ***Indian Farmers Fertilizer Co-Operative Limited v. Bhadra Products, 2018 (1) Arb. LR 271 (SC)*** wherein the Supreme Court has observed as under:

> "....
> *7. The point at issue is a narrow one: whether an award on the issue of limitation can first be said to be an interim award and, second, as to whether a decision on a point of limitation would go to jurisdiction and, therefore, be covered by Section 16 of the Act.*
>
> *8. As can be seen from Section 2(c) and Section 31(6), except for stating that an arbitral award includes an*

interim award, the Act is silent and does not define what an interim award is. We are, therefore, left with Section 31(6) which delineates the scope of interim arbitral awards and states that the arbitral tribunal may make an interim arbitral award on any matter with respect to which it may make a final arbitral award.

9. 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. However, it is important to add a note of caution. In an appropriate case, the issue of more than one award may be necessitated on the facts of that case. However, by dealing with the matter in a piecemeal fashion, what must be borne in mind is that the resolution of the dispute as a whole will be delayed and parties will be put to additional expense. The arbitral tribunal should, therefore, consider whether there is any real advantage in delivering interim awards or in proceeding with the matter as a whole and delivering one final award, bearing in mind the avoidance of delay and additional expense. Ultimately, a fair means for resolution of all disputes should be uppermost in the mind of the arbitral tribunal.

10. To complete the scheme of the Act, Section 32(1) is also material. This section goes on to state that the arbitral proceedings would be terminated only by the final arbitral award, as opposed to an interim award, thus making it clear that there can be one or more

> *interim awards, prior to a final award, which conclusively determine some of the issues between the parties, culminating in a final arbitral award which ultimately decides all remaining issues between the parties. .....”*

28. The Supreme Court in the above judgment has clearly held that when issues are dealt with by the Tribunal in a piecemeal fashion, the resolution is likely to be delayed. If an issue is conclusively determined prior to the final award, the same constitutes an `interim award'. In the present case, nothing remains to be adjudicated in respect of the additional claims, in the final award. This would be the test to hold that the Section 34 petition is maintainable.

29. The order of the Ld. Arbitrator clearly has a finality attached to it, in respect of the additional claims, and is, thus, held to be an award, against which a Section 34 petition is maintainable. The judgments cited by learned counsel for Respondent, which held that a Section 34 petition is not maintainable against interim awards, deal with orders passed by the Ld. Arbitrators on issues which are clearly distinguishable.

30. In ***Container Corporation (supra)*** an amendment to the written statement to add a counter claim to the tune of Rs.9.6 crores was rejected by the Tribunal, on the ground that the same was filed at the stage when both parties had almost concluded their arguments in the main matter. The Ld. Single Judge while observing as to what constituted an interim award, 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."*

31. Thus, the Court appears to have been persuaded by the fact that the amendment was moved at a belated stage i.e. when the final arguments were almost concluded, in rejecting the Petition under Section 34 of the Act.

32. In ***M/s Shyam Telecom Ltd. (supra)***, a Ld. Single Judge of this Court observed as under:

> *"... An interim order thus cannot be said to be an interim award when the order is not in the nature of a part decree."*

33. In the facts of the said case, the Court held that order passed therein was not in the manner of a part decree, but only an interim order.

34. In ***Punj Lloyd Limited v. ONGC (supra),*** the Claimant sought to amend one of the claims to include interest during the period when conciliation proceedings were going on between the parties. The Bombay High Court, following the decision of the Delhi High Court in ***Container Corporation (supra)*** held that under the provisions of the Arbitration Act, very limited intervention is permitted by the Court and the judgment in ***Shah Babulal Khimji (supra)*** would not be applicable to proceedings filed under the Arbitration Act. This Court respectfully disagrees. ***Container Corporation (supra)*** was unique in its own facts as the stage at which the amendments were raised was extremely belated and the Respondent therein was attempting to raise a counter claim when no counter claim had in fact been filed.

35. Arbitral proceedings are not meant to be dealt with in a straightjacket manner. Arbitral proceedings cannot also be conducted in a blinkered manner. There could be various situations wherein, due to inadvertent or

other errors, applications for amendments/corrections may have to be moved. So long as the disputes fall broadly within the reference, correction and amendments ought to be permitted and a narrow approach cannot be adopted. The principles of ***Shah Babulal Khimji (supra)*** would have greater application in arbitral proceedings as the said judgment lays down the principle, that the substantive rights affected ought to be seen, while determining what kind of orders are challengeable. An interim order of the present kind rejecting a large number of additional amounts/claims would constitute an interim award under Section 2(1)(c) of the Act.

36. In the facts of this case, it is clear that the quantification of claims was done correctly in the notice invoking arbitration, in the application under Section 11 as also in the writ petition filed by the Petitioner. 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.

37. It is, accordingly, held that the present petition is maintainable. Additional claims having been raised in the first place in the notice invoking arbitration, the claims are not time barred by limitation as the

commencement of arbitral proceedings is governed by Section 21 of the Act which stipulates that the notice invoking arbitration constitutes commencement. Amended claim petition is, therefore, directed to be taken on record. This Court has not gone into the merits of the amendments made or sought. All the claims would have to be adjudicated by the Ld. Arbitrator in accordance with law, after affording adequate opportunity to the Respondent.

38. Considering that the arbitration in the present case was invoked way back in 2003, the claim petition having been filed in 2003 itself, the impugned order having been passed in 2009, the matter is remitted to the Ld. Arbitrator for adjudicating the disputes between the parties, in a time bound manner, preferably within a period of one year from the date of first appearance before the Ld. Arbitrator.

39. OMP is disposed of with the above observations. All pending I.As. stand disposed of.

PRATHIBA M. SINGH, J.
JUDGE

FEBRUARY 12, 2019/*dk*