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

Date of Decision:- 26.02.2020

\+ O.M.P. 2/2020, I.A. 2417/2020, 2418/2020, 2419/2020

MEERA GOYAL ..... Petitioner

Through: Mr. Ashwini Kumar Mata, Sr. Adv. with Mr. Abhishek Puri, Mr. V. Siddharth and Mr. Manan Gambhir, Advs.

versus

PRITI SARAF ..... Respondent

Through: Mr.Sandeep Sethi, Sr. Adv. with Mr.Shailendra Babbar, Ms.Manisha Parmar, Mr.Hemant Manjani & Mr.Vinayak Marwah, Advs.

\+ O.M.P.(T) 1/2020, I.A. 2414/2020, I.A. 2415/2020 & I.A. 2416/2020

MEERA GOYAL ..... Petitioner

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CORAM:
HON'BLE MS. JUSTICE REKHA PALLI

REKHA PALLI, J (ORAL)

1. This decision disposes of two petitions filed by Ms. Meera Goel who is the respondent in the arbitration proceedings bearing case No.REF:DAC/1405/11-16. The first petition, preferred under Section 34 of the Arbitration and Conciliation Act, 1996 ('the Act') seeks *inter-alia* setting aside of the order dated 05.02.2020 passed by the learned Arbitrator, which is sought to be termed as an 'interim Award' by the petitioner; rejection of the respondent's claims as also expunction of a portion of the deposition given by the claimant's witnesses and the documents tendered in evidence by the respondent. The second petition, preferred under Sections 14 and 15 of the Arbitration and Conciliation Act, 1996, seeks termination of the mandate of the present sole Arbitrator and for appointment of a substitute Arbitrator.

2. Before dealing with the rival contentions of the parties, it would be appropriate to notice the brief factual matrix of the matter at the outset. The Petitioner who is the owner of property bearing No.37, Friends Colony, East, New Delhi entered into an agreement to sell with the respondent on 24.12.2011 for sale of a portion thereof, admeasuring 1205.43 sq. yards for a total sale consideration of Rs.63,28,50,750/-. The respondent paid a sum of Rs.12.50 crore to the petitioner by way of earnest money, and thereafter paid her a further sum of Rs.5.40 cr. in the year 2012. On 13.01.2013 the petitioner, alleging that the respondent had failed to pay the balance sale consideration within the time prescribed, terminated the agreement

dated 24.12.2011. Subsequently, the parties began communicating to explore the possibility of a settlement, but to no avail. As a result, the respondent preferred petitions before this Court under Sections 9 and 11 of the Act alleging that the petitioner had breached the agreement to sell and, therefore, the earnest money was liable to be refunded to her along with damages. The respondent also prayed for the appointment of an Arbitrator on the ground that notwithstanding its legal notice to the petitioner dated 28.01.2016 invoking arbitration and seeking nomination of an arbitrator, the petitioner had failed to respond thereto.

3. On 04.11.2016 this Court, despite the petitioner's denial of being in breach of the agreement or having received the respondent's legal notice, noticed the fact that the existence of the arbitration clause itself was not disputed by the petitioner and appointed Justice Mukul Mudgal (Retd.) as the sole Arbitrator to adjudicate the disputes between the parties. While doing so, this Court had specifically observed that the issues viz. whether arbitration had been invoked by the respondent in time and whether the respondent's claim was barred by limitation, were be decided by the learned Arbitrator.

4. Pursuant thereto in December 2016, the respondent filed its claim petition before the learned Arbitrator by specifically stating that it had sent a legal notice to the petitioner on 28.01.2016 invoking arbitration. On the other hand, the petitioner filed its statement of defence by, *inter alia*, opposing the respondent's claims on merits and specifically denying the allegation of ever being served or having received the purported legal notice dated 28.01.2016.

5. On 23.05.2017, the learned Arbitrator, after recording that the respondent had filed its affidavit of admission and denial of documents, directed the petitioner to file its affidavit of admission and denial of documents. The parties were also directed to file their respective affidavits of evidence on or before 10.07.2017. On this subsequent date, even though the petitioner raised an oral objection under Section 16 (3) of the Act contending that a part of the respondent's claim was not covered by the agreement to sell, this objection was not entertained by the learned Arbitrator who observed that the same would be considered as and when raised by way of a separate application. It is pertinent to note that the matter was thereafter adjourned from time to time, and no application under Section 16 was filed by the petitioner. On 22.09.2017, the respondent was granted permission by the learned Arbitrator to amend her statement of claim and to approach this Court for seeking assistance for summoning of two witnesses. Consequently, the respondent sought leave to incorporate fifteen amendments in her claim statement, but the learned Arbitrator, vide its order dated 01.02.2018, allowed only two of the proposed amendments, primarily being typographical corrections. By the same order, the learned Arbitrator at the time also recused himself on account of official commitments. As a result, this Court, vide its order dated 21.03.2018 passed in OMP (T) 2/2018, appointed Justice B.D. Ahmed (Retd.) as the substitute Arbitrator, who also subsequently recused from these proceedings on 19.11.2018. Finally, this Court appointed Justice Ms. Indermeet Kaur Kochar (Retd.) as the sole Arbitrator to adjudicate the disputes

between these parties vide order dated 14.12.2018 passed in OMP (T) 8 of 2018.

6. Since this Court on 14.12.2018 had directed the proceedings to continue from the stage that they were at before the erstwhile Arbitrator, the present Arbitrator, upon entering reference, commenced its mandate by taking up the respondent's application seeking review of the order dated 01.02.2018 passed by the Predecessor Arbitrator disallowing thirteen of its proposed fifteen amendments to the claim statement. The review application was rejected by a detailed order passed by learned Arbitrator on 11.03.2019 and the matter was, thereafter, adjourned to 26.04.2019 and then to 29.05.2019 for the claimant/respondent to file the evidence of its witnesses by way of affidavit.

7. On 29.05.2019, during the examination-in-chief and part cross-examination of the respondent's first witness (CW1), the petitioner moved an application objecting to certain portions of CW1's affidavit on the ground that they were beyond the scope of the pleadings on record and referred to facts pertaining to the disallowed amendments. However, after some arguments, this application was withdrawn by the petitioner with liberty to raise the said issue at the time of final arguments. When the cross examination of the respondents' witnesses was concluded on 03.09.2019, the learned Arbitrator directed the petitioner to file the affidavit of evidence of its witnesses within a period of 10 days, which was duly complied with.

8. The petitioner's witness RW1, was examined and cross examined on 24.09.2019, 30.09.2019, 17.10.2019 and finally on 11.11.2019, on

which date the learned Arbitrator, while granting four weeks' time to both sides to file their respective written submissions, adjourned the matter to 12.12.2019 and 16.12.2019 for arguments. It appears that on 12.12.2019, due to non-availability of the counsel, the matter was adjourned to 16.12.2019 on which date, part arguments were addressed on behalf of the respondent. On the next date, i.e., 14.01.2010, the respondent concluded its arguments before the learned Arbitrator and the petitioner made part arguments. On this date, however, the respondent filed an application for placing on record certain additional documents which were stated to be copies of the Annexures of the respondent's petitions under Sections 9 and 11 of the Act, filed before this court in 2016 and had led to the commencement of arbitration proceedings. The petitioner was granted time to file its reply to the respondent's application and the next date of hearing the matter was fixed for 27.01.2020, 04.02.2020 and 05.02.2020 for remaining arguments of the petitioner. On 27.01.2020, the petitioner filed two applications, the first being under Section 14 (1) (a) of the Act and the second being under Section 16 read with Section 31 (6) of the Act, whereupon the order impugned herein came to be passed. The matter was then adjourned to 04.02.2020 to enable the respondent to file its reply to the petitioner's applications.

9. On 04.02.2020, the learned Arbitrator allowed the respondent's application, after observing that the documents sought to be brought on record formed a part of the judicial record before this Court, albeit with a specific rider that the authenticity, weight and relevance thereof would be decided at the time of final arguments. On this date the

learned Arbitrator also heard part arguments on the petitioner's two applications. Ultimately, on the next date of hearing, i.e., 05.02.2020. the petitioner's applications came to be rejected, which order of the learned Arbitrator has been impugned in the Section 34 petition.

10. In support of this petition Mr. Ashwani Mata, learned senior counsel for the petitioner besides urging that an order passed by the learned Arbitrator refusing to decide petitioner's objections under Sections 16(2) and 16(3) of the Act amounts to rejection of its pleas and, therefore, constitutes an interim award which can be challenged under Section 34 of the Act, has primarily raised two contentions. The first and foremost plea of Mr. Mata is that the petitioner's objections regarding the claims being barred by limitation and maintainability of the claim petition under Section 16 (2) of the Act, were questions of jurisdiction which needed to be decided as preliminary issues, as per Section 16(5) of the Act, by the learned Arbitrator before dealing with the claim petition on merits. He further submits that in the same way, the petitioner's objections under Section 16(3) to the affidavits of the respondent's witnesses bearing averments which were beyond the scope of the pleadings on record, also amounted to the Arbitral Tribunal exceeding its Authority and these objections were also in the nature of jurisdictional issues, which were required to be adjudicated as preliminary issues. He contends that Section 16(5) of the Act places an obligation on the Arbitrator to decide all jurisdictional issues before continuing with arbitral proceedings or adjudicating the disputes on merits. By placing reliance on the decisions of the Supreme Court in ***McDermott International Inc. Vs. Burn Standard***

Ltd. and Ors. *(2006) 11 SCC 181*, ***Uttarakhand Purv Sainik Kalyan Nigam Limited v. Northern Coal Field Limited*** *2019 SCC OnLine SC 1518* and ***Kvaerner Cementation India Limited Vs. Bajranglal Agarwal and Anr.*** *(2012) 5 SCC 214* he submits that the learned Arbitrator while holding that the objections of the petitioner would be considered at the stage of passing the final award, has overlooked the fact that the arbitrator has no discretion to refrain from deciding jurisdictional issues as preliminary issues and defer a decision thereupon till the time of rendering the final award. He further submits, by relying on the observations of the Supreme Court in paragraph 35 of its decision in ***Uttarakhand*** *(supra)*, that the learned Arbitrator has gravely erred in holding that an objection on the maintainability of the claim and its validity on the ground of limitation were not questions of jurisdiction.

11. Mr. Mata further submits that the learned Arbitrator has also failed to appreciate that the question of limitation, being a mixed question of fact and law, could be raised by the petitioner only after evidence had been led by the parties. He, therefore, contends that the learned Arbitrator's refusal to decide these issues under Section 16 (2) of the Act or the petitioner's objections under Section 16 (3) of the Act on the presumption that the pleas were raised belatedly is not only erroneous but is also contrary to the record. It is his contention that the issue of limitation, even though jurisdictional in nature, could be raised only after evidence had been led. Similarly, any cause for the petitioner to raise its objections under Section 16 (3) of the Act arose only after evidence was tendered by the respondent's witnesses and

the learned Arbitrator had permitted the respondent to bring documents on record, which were beyond the scope of the pleadings, during the period between May to November, 2019. He, thus, contends that the petitioner had raised these jurisdictional issues in a timely manner, at the earliest and therefore, the learned Arbitrator could not have refused to decide these issues on any alleged delay attributable to the petitioner in raising these issues.

12. Insofar as the second petition under Sections 14 and 15 of the Act is concerned whereunder the petitioner has sought termination of the learned Arbitrator's mandate Mr. Mata, besides reiterating his previous arguments, submits that the learned Arbitrator has given a complete go-by to the settled principles of civil procedure and evidence by permitting the respondent/claimant to place on record almost 2400 pages of documents which were neither relevant, nor admissible. He submits that in doing so, the learned Arbitrator operated under the misconception that these documents were certified copies of the judicial record and ignored the fact that the respondent's attempts to amend her claims had already been rejected by the predecessor Arbitrator. He thus contends that these lapses were clearly indicative of the *de jure* inability of the learned Arbitrator to reliably continue discharging her mandate. Mr. Mata further submits that even though Section 18 of the Act casts a duty upon an Arbitrator to treat opposite parties on an equal footing, yet the learned Arbitrator has, while permitting the respondent to bring on record irrelevant, inadmissible and voluminous documents running into 2400 pages, rejected the petitioner's prayer to place on record the report of the

statutory Auditor on the specious ground that it was a private document. He, thus, contends that the learned Arbitrator is not even granting a fair and equal opportunity to the petitioner to present her case.

13. Mr. Mata finally submits that the learned Arbitrator has also failed to adhere to the schedule of fees as prescribed by the Delhi International Arbitration Centre under the aegis whereof the arbitration is being conducted. He submits that the learned Arbitrator was entitled to receive fees of only Rs.25,00,000/-, besides administrative charges of Rs.5,000/- which already stood deposited with the Delhi International Arbitration Centre in terms of the Rules; for this purpose, he places reliance on an email received by him from the Delhi International Arbitration Centre on 22.02.2020. He submits that on 14.01.2020, the learned Arbitrator, while opining that as per the Rules it was entitled to receive a further sum of Rs.15,00,000/- over and above the sum of Rs.25,00,000/- which additional amount was also to be borne equally by both the parties and had already been paid, had held itself to be entitled to receive a further amount of Rs. Rs.5,00,000/- towards administrative expenses. She has, therefore, directed the parties to deposit a sum of Rs.1,25,000/- each, on the next date of hearing. He, thus, submits that not only were the parties forced to pay amounts in excess of the fees prescribed under Schedule-IV of the Act, but they were also compelled to pay a sum of Rs.15,00,000/- directly to the learned Arbitrator in contravention of the Rules of Delhi International Arbitration Centre. He submits that this is further proof of the de jure inability of the learned Arbitrator to perform its functions. In support

of his aforesaid contentions, he places reliance on a decision of the ***Madras High Court in Madras Fertilizers Limited, Manali, Chennai Vs. SICGIL India Limited,*** *2010 (2) CTC 357,* and two decisions of the Bombay High Court in ***Sahyadri Earthmovers Vs. Land Finance Limited and Anr.*** *(2011) 6 Bom CR 393* and ***Parekh Industries Limited Vs. Diamond India Limited*** *2019 SCC OnLine Bom 851*. He also places reliance on a decision of a Coordinate Bench of this Court in ***National Highways Authority of India s. Gammon Engineers and Contractor Pvt. Ltd.*** *2018 SCC Online Del 10183* to contend that when the parties have agreed upon a certain amount of fees to be paid to the Arbitrator, they expect the proceedings to be conducted fairly and on the principles of proportionality and objectivity; once the Arbitrator does not follow the schedule of fees agreed upon, undoubtedly the Arbitrator would then be deemed to be acting beyond its mandate. Thus, Mr. Mata contends that this is a fit case for terminating the mandate of the learned Arbitrator and that even the order dated 05.02.2020, as also the previous orders passed by the Tribunal permitting the respondent's evidence and documents to be brought on record which were beyond the scope of the pleadings, be set aside and the respondent's claims be dismissed by this Court itself as they are evidently barred by limitation and are not maintainable.

14. On the other hand, Mr. Sandeep Sethi, learned Senior Counsel for the respondent, who appears on an advance notice, vehemently opposes the maintainability of both these petitions. He submits that once it is the petitioner's admitted case that the learned Arbitrator has, till date, not decided its objections on merits by specifically observing that

since the trial was nearing completion, they would be dealt with at the time of rendering the final award, it cannot be said that these issues had been finally determined by the learned Arbitrator to be characterised as an 'interim Award' amenable to a challenge under Section 34 of the Act. He contends that before terming an order as an interim arbitral award, it must fulfil the conditions prescribed under Section 31(6) of the Act and must necessarily decide a contentious issue between the parties, which is not the case in the present petitions. For these reasons, he vehemently urges that the present petition under Section 34 is not maintainable. In support of this contention, he places reliance on a decision of the Supreme Court in ***Indian Farmers Fertilizer Cooperative Limited Vs. Bhadra Products*** *(2018) 2 SCC 534* as also on the decisions of two coordinate benches of this Court in ***Rhiti Sports Management Pvt. Ltd. Vs. Power Play Sports and Events Ltd.*** *2018 SCC OnLine Del 8678* and ***ONGC Petro Additions Limited Vs. Tecnimont S.P.A. and Anr.*** *2019 SCC OnLine Del 8976*.

15. Mr. Sethi further submits that even if the petitioner's objections are deemed to have been 'rejected' under the impugned order, no challenge to the same was permissible at this stage. By placing reliance on the decision of the Supreme Court in ***S.B.P. & Co. Vs. Patel Engineering Ltd. & Anr*** *(2005) 6 SCC 288* and the decision of this Court in ***Tangirala Srinivasa Gangadhara Baladitya vs. Sanjay Aggarwal, Sole Arbitrator and Others*** *2019 SCC OnLine Del 9112*, he contends that only when the Arbitrator upholds the objections raised under Sections 16(2) or 16(3) of the Act can an appeal be

preferred thereon. On the other hand, when such objections are overruled, the arbitrator is enjoined to continue with the proceedings and pass a final award whereafter the party aggrieved may raise these objections as grounds for challenging the final award. He further submits that even a petition under Sections 14 and 15 of the Act is not maintainable at this stage as it is not as if the petitioner's objections under Section 16 (2) & 16 (3) have been finally rejected, they are yet to be finally adjudicated and have been, for the time being, deferred for decision till the passing of the final award.

16. Mr. Sethi submits, by placing reliance on a decision of the Supreme Court in ***HRD Corporation (Marcus Oil and Chemical Division) Vs. Gail (India) Limited*** *(2018) 12 SCC 471*, that it is only when a person becomes ineligible to be appointed as an Arbitrator under Section 12(5) read with Schedule-VII of the Act, can he be treated as being de jure unable to perform his functions. On the other hand, in case the mandate of the arbitrator has been challenged on the grounds enumerated in the Schedule V, regarding its independence and impartiality, the same is to be determined based on the facts of each case. In a situation where the arbitrator rejects this challenge by holding that there are no justifiable doubts regarding his impartiality and independence, it is enjoined to continue with the proceedings and render a final award. It is only after the passing of the award and at the time of laying a challenge thereto under Section 34 of the Act, that the party aggrieved by his mandate is permitted to agitate the issue regarding its impartiality and independence as one of the grounds in its petition under Section 34 of the Act. To sum up, even when the

mandate of the arbitrator has been challenged on the ground of impartiality and independence, which challenge is subsequently rejected, the arbitration proceedings must continue. Applying these principles to the present case where the challenge to the mandate of the learned Arbitrator has been laid on the ground of alleged violation of the Code of Civil Procedure, 1908 and the Indian Evidence Act, 1872, which are also questions to be determined on the peculiar facts of the present case, he submits that there is no reason to stall the present arbitral proceedings, which is nearing conclusion. In support of his aforesaid contention, he also places reliance on the decision of a Division Bench of this Court in ***Progressive Career Academy Pvt. Ltd. Vs. FIIT JEE LTD*** **(2011)** *180 DLT 714 (DB)* and of two coordinate Benches of this Court in ***M/s Era Infra Engineering Limited Vs. Airport Authority of India*** *2018 (6) R.A.J 356 (Del)* and ***MBL Infrastructures Ltd. Vs. Telecommunication Consultants India Ltd. &Ors.*** *2015 SCC OnLine Del 6587.*

17. Mr. Sethi finally submits that even the petitioner's plea that the learned Arbitrator had violated the schedule of fees as prescribed in Delhi International Arbitration Centre is contrary to record. In any event, once the learned senior counsel for the petitioner had. before the learned Arbitrator, specifically given up his challenge on this count as recorded in the impugned order, the petitioner is estopped from raising this ground before this Court. He, therefore, prays that the second petition also be dismissed with exemplary costs.

18. Having heard learned senior counsel for the parties at length, what emerges is that the challenge in both the petitions is primarily based

on the same set of facts and is premised on identical grounds. As noted hereinabove, the petitioner's challenge under Section 34 is premised on the ground that the learned Arbitrator was obligated to decide its objections at the time when they were raised, before proceeding to decide the respondent's claims on merits. The additional grounds urged in support of the petition seeking termination of the arbitrator's mandate is that the learned Arbitrator has not adhered to the Schedule of fees as prescribed under the Rules of the Delhi International Arbitration Centre and, besides demanding excessive fees, has collected the fees directly from the parties.

19. Before dealing with these rival contentions of the parties, it may be appropriate to refer to the impugned order dated 05.02.2020 wherein the learned Arbitrator has meticulously dealt with each of the grounds taken by the petitioner. The relevant extracts of the order reads as under:-

> *"There are five sub-heads recorded in the said application. The first is*
>
> > *A) Failure to determine jurisdiction in section 16(5) of the Act, it is pointed out that in the SOD itself (filed on March 2017) the challenge to the jurisdiction of the Tribunal was stated. It is pointed out that issue of jurisdiction is a mixed question of law and facts and the Respondent was waiting for the evidence to be concluded before he could again raise his flag on this objection. In the pre-hearing written submissions submitted by the Respondent on 11.12.2019 he had formulated the issues (A), (B), (H) to (K) which should have been taken up as Preliminary issues and this have been pointed out to the Tribunal on 12.12.2019 itself. The tribunal should have in the first instance granted opportunity to the Respondent to address his submission on these Preliminary*

issues as if this Tribunal would have concluded that it does not have the jurisdiction /exceed jurisdiction no time would be wasted in continuing with arguments on the main merits on the matter. The Tribunal did not agree to this submission for which reason the Respondent has lost confidence in this tribunal.

B) The second objection pointed out in the body of the application is FAILURE TO ADHERE TO THE PRINCIPLES OF THE CODE OF CIVIL PROCEDURE AND THE INDIAN EVIDENCE ACT. Ld. Sr. Counsel for the Respondent has highlighted various dates of the evidence of CW-1, CW-2, CW-3 and RW -1 to support his arguments that time and again it had been pointed out to the Tribunal that the evidence was beyond the pleadings and that part of the evidence which was beyond pleadings has necessarily to be struck off but again this objection of the Respondent was not answered by the Tribunal.

C) The third objection raised by the Respondent is the failure to provide equal treatment to the party to advance the submissions. Ld. Sr. Counsel for the Respondent has highlighted the provisions of section 18 of the said Act. It is pointed out that various documents confronted to CW -1 had been exhibited but the same treatment was not meted out to the Respondent when he came into the witness box.

D) The fourth objection raised in the application is the Failure to discharge its function to the timely manner. Qua the arguments Ld. Sr. Counsel for the Respondent submits that it is not his case that the Tribunal does not yet have time to pass the award as per the stipulated period enshrined under the Act; his submission on his core is that the application filed by the Claimant have been allowed which has disturbed the time line of this Tribunal.

E) The fifth objection raised in the application is the Failure on the part of the Tribunal to adhere to schedule of the fee as prescribed under the DIAC. Qua this objection Ld. Sr. Counsel for the Respondent submits that it had been agreed that in terms of claim amount raised by the Claimant the undersigned is entitled to a fee of Rs. 37,50,000/-. The

Tribunal has adhered to this figure. Administrative fee of Rs. 5 lakhs Rs. 2.5 lakhs each) had been imposed which is permissible under the DIAC Rules. Ld. Sr. Counsel for the Respondent accordingly does not press this point."

"11. As noted earlier the Claimant had completed his arguments on 14.1.2020 on which date the Respondent had also addressed arguments in part. The matter had been fixed for three more dates to conclude the arguments as per time line given by the respective counsels. It is also to be noted that on 23.5.2017 it had been recorded that the pleadings will form the issues. The issues highlighted by the Respondent in his pre-hearing written submissions A, B, H to K are issues which have been formulated by the Respondent himself. The submission of the Ld. Sr. Counsel that he should be permitted to start arguments when admittedly he is the respondent is an unheard of submission. The Claimant having filed the claim will first have to address his submission which is in accordance with the procedure laid down in CPC. The arguments of the Ld. Sr. Counsel for the Respondent that evidence beyond pleadings has been permitted and the detailed highlighting of the evidence at this juncture does not come to his aid. This necessarily has to be answered at the time of final arguments. Again it would be relevant to note that in May 2019 an application had been filed by the Respondent stating that, that part of the evidence which is beyond pleadings should be struck off. This was noted by the Tribunal. The Respondent at that stage had withdrawn the application which permission had been granted to him to address this submission at the time of final arguments. This was vide order dated 29.05.2019. Thereafter another application had been filed by the Respondent under Section 19(4) of the said Act which again raised a similar plea. This application was directed to be kept in abeyance with the objection raised in the said application to be addressed at the time of final arguments. This was vide order dated 17.10.2019. It is not as if the Tribunal has discarded the arguments of the Respondent or has ever given any impression to the Respondent that his submissions will not be heard. All arguments to be advanced by the Respondent will be addressed by the Respondent and answered in the Award.

No piecemeal adjudication can take place at this stage. At the cost of repetition it is noted that no separate application under Section 16 of the said Act has been filed. The respondent has already addressed his arguments in part. The Claimant has completed his arguments in the affirmative. The trial is almost at its conclusion. This application smells and racks of malafides. It is dismissed with cost quantified at Rs. 25,000/-.

12. The second application is termed as a formal application filed by the Respondent where the prayer is the issue of jurisdiction under Section 16 be decided at the first instance.

13. Reply has been filed opposing the application.

14. The undersigned has passed a detailed order on the first application under Section 14(1) (a) of the said Act wherein the plea raised by the Respondent that the question of jurisdiction be decided in the first instance has been rejected. It is reiterated that this stage when the trial is almost complete and no application under Section 16 of the said Act having been filed earlier inspite of the direction contained in the order dated 23.5.2017 this prayer cannot be acceded to. All objections of the Respondent shall be answered in the Award. Application dismissed."

20. Having noted the contents of the impugned order, the first and foremost issue arising for my determination is whether, as vehemently urged by the petitioner, the order dated 05.02.2020 can be termed as an interim award. As per the petitioner, the learned Arbitrator's refusal to decide the issues arising out of its objections at this stage tantamounts to rejection of the prayers made in its application, which is evident from a perusal of the aforesaid application and the impugned order is, therefore, in the nature of a final determination. I am unable to agree with this submission of the petitioner. When there has been no determination by the learned Arbitrator on the objections

raised by the petitioner, can it be stated that any right of the parties was finally determined which is a pre-condition for an order to be termed as an interim award under Section 31(6) of the Act? The answer is a clear No. The learned Arbitrator has, in no uncertain terms, stated in the impugned order that these objections of the petitioner would be decided at the time of passing of the final award and, therefore, it cannot be deemed as a 'rejection' of the petitioner's objections. The fact however remains that there has been absolutely no determination of the petitioner's objections at this stage. It merely defers a final decision on the petitioner's objections, to a later stage and, that too, for a justifiable reason; the same being that the trial was almost about to end. That being the position, the impugned award does not qualify as an interim award for the purpose of being challenged under Section 34 of the Act. Reference in this regard may be made to paragraphs 16 and 17 of ***Rhiti Sports*** *(supra)* which reads as under:

> *"16. A plain reading of Section 32 of the Act indicates the fact that the final award would embody the terms of the final settlement of disputes (either by adjudication process or otherwise) and would be a final culmination of the disputes referred to arbitration. Section 31(6) of the Act expressly provides that an Arbitral Tribunal may make an interim arbitral award in any matter in respect of which it may make a final award. Thus, plainly, before an order or a decision can be termed as 'interim award', it is necessary that it qualifies the condition as specified under Section 31(6) of the Act: that is, it is in respect of which the arbitral tribunal may make an arbitral award.*

17. As indicated above, a final award would necessarily entail of (i) all disputes in case no other award has been rendered earlier in respect of any of the disputes referred to the arbitral tribunal, or (ii) all the remaining disputes in case a partial or interim award(s) have been entered prior to entering the final award. In either event, the final award would necessarily (either through adjudication or otherwise) entail the settlement of the dispute at which the parties are at issue. It, thus, necessarily follows that for an order to qualify as an arbitral award either as final or interim, it must settle a matter at which the parties are at issue. Further, it would require to be in the form as specified under Section 31 of the Act."

21. Reference may also be made to paragraph 13 of ***ONGC Petro Additions Limited*** *(supra)* which reads as under:

> ***"13.*** *In the present case, the impugned order does not decide or finally dispose of any issue. Dr.Singhvi has attempted to overcome the objection of maintainability by focusing on the question of finality of the decision. He has also relied upon certain decisions to contend that the right to lead evidence is a valuable right and is inherently related to due process and fairness in proceedings. There may not be much quarrel on this proposition in law, however, the Court has to be mindful of the fact that the order impugned in the present petition is nothing but a procedural order. The Arbitral Tribunal while passing such procedural order may determine certain valuable rights of the parties. However, it does not mean that such determination renders an order to be an award within the meaning of Section 2(1)(c) of the Act. The determination of a valuable right in any legal proceedings would not necessarily result in an immediate actionable right.* ***In order to ascertain whether an order is an interim award or partial award, the two most important factors that would weigh upon the Court are the concept of "finality" and "issue". If the nature of the order is "final" in a sense that it conclusively decides an issue in the arbitration proceedings, the order would qualify to be an interim award. This is not the situation in the present case. The impugned order only rejects OPaL's application for placing additional documents on record. It does not decide an issue or the subject matter***

of adjudication between the parties. The arbitral tribunal has only decided the question as to whether the Petitioner would be permitted to file additional documents at a later stage. The order impugned though conclusively determines the application, however, it cannot be said that the subject matter of arbitration and the rights of the parties in respect thereof have been finally determined. *One cannot ignore the fact there is no provision under the Act that permits OPaL to challenge a procedural order passed by the Arbitral Tribunal. For an order to qualify as an "award", the test of finality is undoubtedly essential, but that does not mean that any final view of the Arbitral Tribunal would come within the ambit of an "award". Dr.Singhvi also argued that the Courts should always step in to advance the cause of justice. He submitted that there may not be any case law directly dealing with identical or similar facts but that should not prevent the Court to adopt an incremental progressive attitude towards development of law. The argument is outwardly attractive and enchanting but, I feel that there are no milestones that the Court has to accomplish. The role of the Court is to interpret the law and apply it to the facts of the case. Imagine the scenario, where the Court's perspective on growth in law runs counter to the legislative intention that is in sync with the modern trends. If the Act does not permit a challenge at this stage, the Court would not take upon itself the burden to adopt an approach that is perceived to be a rational one. The Court has the bounden duty to apply the law as it exists and not interpret it merely because it appears to be a more satisfactory view. I cannot create an opening, if the door is tightly shut. If the law permits an entry, only then the Court can decide the extent for opening the door. The Courts may advance development of law, but that cannot be achieved by assuming the role of a legislator. Such move should be well guarded and well considered. It is critical that Courts do not go beyond the legislative intent. The Courts would also not remove the deficiencies, if such are shown to exist in a legislation. It is for the legislature to make amends. Heavy weight of the claims does not allow the Court to lift the bar or bend it to suit a particular view. I also have reservations to say that permitting a challenge to final decisions on procedural aspects would be a progressive approach. Under*

> *the current scheme of the Act, the intent is clear that such matters be left for the Arbitral Tribunal to decide. The crux of the matter regarding the question of maintainability cannot be clouded by reasons and grounds that touch upon matters of merits. I also cannot see any opening granted by the Court in Cinevistaas (supra) that can be widened to allow this petition, no matter how strong the case may be on merits."*

22. In the light of these decisions and the admitted position that the objections raised by the petitioner qua limitation and maintainability of the claims have not been adjudicated and the rights of the parties have not been finally determined by way of the impugned order, I have no hesitation in holding that the same is not an interim award. Though the present petition under Section 34 of the Act is liable to be rejected on this short ground alone, since extensive arguments have been made by both sides on whether or not it was mandatory for the learned Arbitrator to decide the petitioner's challenge under Section 16 of the Act before passing the final award, I am also proceeding to examine this aspect.

23. As noted hereinabove, one of the reasons for the learned Arbitrator to defer a decision on the petitioner's objections was that the petitioner, who had admittedly raised the plea of limitation in its statement of defence filed before the learned Arbitrator in February, 2017 chose to wait till 27.01.2020 to move an application in this regard under Section 16 of the Act, by which time not only had both parties led their evidence but even the respondent had concluded its final arguments. In my view, the learned Arbitrator rightly deferred its decision on the petitioner's objections by holding that the same was being raised at the fag end of the trial and therefore, it would not be

appropriate to have a piecemeal adjudication of the same. Though the petitioner has vehemently urged that the application under Section 16 could be moved only after evidence had been led by the parties, I am unable to agree with this submission as well. If the petitioner was convinced that the respondent's claim was barred by limitation and per se not maintainable on any ground whatsoever, it was incumbent upon the petitioner to move an application to that effect at the time of initiation of the arbitration proceedings or shortly thereafter. In this regard, reference may be made to the observations of the Supreme Court in paragraph 51 of its decision in ***MC Dermott International*** *(supra)*, which reads as under:

> *"51. After the 1996 Act came into force, under Section 16 of the Act the party questioning the jurisdiction of the arbitrator has an obligation to raise the said question before the arbitrator. Such a question of jurisdiction could be raised if it is beyond the scope of his authority. It was required to be raised during arbitration proceedings or soon after initiation thereof. The jurisdictional question is required to be determined as a preliminary ground. A decision taken thereupon by the arbitrator would be the subject-matter of challenge under Section 34 of the Act. In the event the arbitrator opined that he had no jurisdiction in relation thereto an appeal thereagainst was provided for under Section 37 of the Act."*

24. Once it is an admitted position that the petitioner's challenge under Section 16 of the Act was made at a stage when the trial was about to conclude, the petitioner's action falls foul of not only the requirement and importance of raising an objection in a timely manner, but has even otherwise dissuaded me from interfering with the decision of the learned Arbitrator to decide these issues at the time of rendering the

final award. By no stretch of imagination can it be said that the learned Arbitrator has followed a procedure unknown in law or has given a go-by to the provisions of the CPC or the Indian Evidence Act. Reference may also be made to Section 19(3) of the Act which clothes the Arbitrator to conduct the proceedings in a manner which it considers appropriate. The same reads as under:-

> *"19. Determination of rules of procedure.- (3) Failing any agreement referred to in sub-section (2), the arbitral tribunal may, subject to this Part, conduct the proceedings in the manner it considers appropriate."*

25. There is yet another reason as to why the impugned order does not warrant interference at this stage. The scheme of the Act leaves no manner of doubt that the Parliament, in its wisdom, has made it abundantly clear, by way of Section 5 of the Act, that there should be no judicial intervention in arbitral proceedings unless it is specifically provided for in the Act. It is also settled law that the Act does not postulate judicial interference in arbitral proceedings on a mere allegation of bias and impartiality at the pre-award stage and all objections in this regard can be raised after the Award has been published. Reference in this regard may be made to Paragraphs 21 and 22 of the decision in ***Progressive Career Academy Pvt.*** *(supra)*:

> *"21. In this analysis, we must immediately observe that the approach taken by one of us (Vikramajit Sen, J.) in Interstate Constructions is not correct as it transgresses and infracts the provisions of the A&C Act. Learned Single Benches have interfered and removed arbitrators obviously on pragmatic considerations, viz. the futility and idleness of pursuing arbitral proceedings despite lack of faith therein because of justifiable doubts as to the independence or impartiality of the arbitrators. Clearly, Parliament has also proceeded on the*

compelling expediency and advisability of expeditious conclusion of these proceedings. Relief against possible mischief has been provided by making clarification in Section 13(5) that apart from the challenges enumerated in Section 13(4), an assault on the independence or impartiality of the Arbitral Tribunal is permissible by way of filing Objections on this aspect after the publishing of the Award. We, therefore, affirm the approach in Pinaki Das Gupta, Neeru Walia, Ahluwalia Contracts (India) Ltd. and Newton Engineering and Chemicals Ltd.. We are of the opinion that the Single Benches who interfered with the progress of the proceedings of the Arbitral Tribunal in the pre-Award stage fell in error. Humans often fall prey to suspicions which may be proved to be ill-founded on the publication of an Award. There is compelling wisdom in Parliament's decision to allow adjudication on grounds of bias, lack of independence or impartiality of the Tribunal only on the culmination of the arbitral proceedings.

22. Having arrived at the conclusion that curial interference is not possible at the pre-Award stage on the allegations of bias or impartiality of the Arbitral Tribunal on the one hand, and our understanding that the Appeals are not maintainable on the other hand, is any further relief to be granted? We think it expedient to abjure from passing any further orders for several reasons including - firstly, the reality that arbitration proceedings would inevitably have already come to an end in those instances where the arbitrator had been removed by orders of the Court, and secondly the availability of redress under Article 136 of the Constitution of India. All pending applications stand disposed of. The Referral Order is answered by reiterating that the statute does not postulate judicial interference in arbitral proceedings till the Award is published, whereupon Objections can be raised also on the platform of the alleged bias of the Tribunal. This challenge is possible provided the grievance is articulated in consonance with Section 13 of the A&C Act."

26. Reference may also be made to paragraphs 18 and 25 of the decision

in ***MBL Infrastructures Ltd.*** *(supra)* which reads as under:-

> *"18. The Court in Bharat Heavy Electricals Limited v. C.N. Garg (supra) upheld the validity of Sections 13(3) and 13(4) of the Act and in that process explained the scheme as under:*
>
> > *"We have already noted that a party having grievances against an Arbitrator on account of bias and prejudice is not without remedy. It has only to wait till the arbitral award comes and it can challenge the award on various grounds including bias and prejudice on the part of the Arbitrator. Before the stage of challenge of award under Section 34 comes, sub-Sections (1), (2) and (3) of Section 13 envisage a situation where the Arbitrator may on his own recuse himself on objection being taken qua his functioning as an Arbitrator or where both the parties agree to his removal as per procedure accepted by them. If both fail, the Arbitrator is required to decide on the challenge to his functioning as an Arbitrator levelled by a party. The Arbitrator is expected to be a fair person and if he finds that there is substance in the allegations, an Arbitrator is expected to dispassionately rule on such an objection. Failing all this the last resort for an aggrieved party is the challenge under Section 13(5) read with Section 34. Thus going on with the ethos of the new Act of speedy progress of arbitration proceedings without judicial interference coupled with the fact that an aggrieved party is not without remedy, it cannot be said that the absence of a provision regarding removal of an Arbitrator renders the relevant provisions of the statute ultra vires the Constitution. We are of the considered view that absence of a provision of removal of an Arbitrator does not render the relevant statutory provisions invalid or ultra vires the Constitution of India."*
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> *XXX XXX*

> *25. The result of the above discussion is that it is not possible for this Court to entertain the present petition seeking removal of the learned Arbitrator under Section 14(2) of the Act on the ground that he has become "de-facto and de-jure" unable to perform his function as an Arbitrator. The Petitioner will have to await the pronouncement of the Award and if aggrieved thereby, seek appropriate remedies under Section 34 of the Act."*

27. Once it is clear that objections regarding bias and impartiality can be raised only at the stage of the rendering the final award, there is absolutely no reason why procedural orders like the impugned order deferring decision on certain issues, should be interfered with at this stage. I have also considered the decisions relied upon by the petitioner in ***McDermott*** *(supra)*, ***Uttarakhand Purv Sainik*** *(supra)* and ***Kvaerner****(supra)* and find that none of them are applicable to the facts of the present case. In ***Uttarakhand Purv Sainik*** and ***Kvaerner***, the Court was not considering interim orders passed by the learned Arbitrator but was, in fact, dealing with objections raised before the Court at the time of appointment of an arbitrator. Further, in ***Mcdermott***, the Court laid great emphasis on raising jurisdictional issues in a timely manner or at the earliest, by specifying that the same ought to be raised at the time of commencement of the arbitration proceedings or soon thereafter which, admittedly, was not the case herein. In this regard, though the petitioner had vehemently urged that all jurisdictional questions must necessarily be decided as preliminary issues, I am of the view that when jurisdictional issues are so intricately intertwined with the substantial claim that without going into the merits of the latter, no decision can be rendered on the

former, it is not mandatory to first decide the jurisdictional issues as preliminary matters. In fact, it is always open to the arbitrator to provide its decision on jurisdictional issues at the time of rendering the final award. In any event, it is always open for the petitioner to approach this Court in case it is aggrieved by the findings of the Arbitrator in the final award with respect to its objections on the grounds of maintainability and limitation; the petitioner cannot be said to be without remedy. I have, therefore, no hesitation in holding that the impugned order warrants no interference by this Court.

28. Now, I deal with the petitioner's plea that the learned Arbitrator has failed to adhere to the prescribed fee schedule which is the only additional ground in support of its case for termination of the mandate of the learned Arbitrator. In this regard, I find merit in the respondent's contention that the petitioner, despite having raised this plea in her application under Section 14 of the Act, had specifically given up this ground before the learned Arbitrator and is, therefore, estopped from raising this plea before this Court. As a result, it is not deemed necessary to refer to the decisions relied upon by the petitioner in this regard in ***SICGIL India Limited*** *(supra)*, ***Sahyadri Earthmovers*** *(supra)*, ***Parekh Industries Limited*** *(supra)* and ***Gammon Engineers*** *(supra)*. In these circumstances, I find no reason to terminate the mandate of the learned Arbitrator. However, in the light of the e-mail dated 22.02.2020 addressed by the DIAC to the petitioner on the aspect of the arbitrator's fee, this Court hopes that the learned Arbitrator will reconsider this aspect and refund the excess fee, if any, to the parties.

29. Accordingly, both the petitions, being meritless, are dismissed with no order as to costs.

REKHA PALLI, J.

FEBRUARY 25, 2020
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