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

% ***Date of decision: 07th December, 2020***

\+ OMP(COMM) 546/2020 & I.A. 10618/2020

LT .COL . H .S .BEDI RETD. & ANR.

..... Petitioners

Through: Mr.Ashim Vachher with Mr.Pawash Piyush, Adv.

versus

STCI FINANCE LIMITED

..... Respondent

Through: Mr. Atul Sharma, Adv.

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

V. KAMESWAR RAO, J. (ORAL)

1. This petition under Section 34 of the Arbitration & Conciliation Act, 1996 ('Act of 1996', for short) has been filed against the order dated October 17, 2020, which according to the petitioners herein is an interim award. Vide the order / interim award, the application of the petitioners herein under Order 6 Rule 17 of Code of Civil Procedure ('CPC', for short) for amendment of the Statement of Defence ('SOD', for short) was rejected by the learned Arbitrator.

2. The case of the petitioners as per the SOD before the learned Arbitrator was that there were two loan accounts of M/s. Cedar Infonet Pvt. Ltd. (Cedar) and M/s. Sukhmani Technologies Pvt. Ltd. (Sukhmani), which companies are family owned and

promoted by the petitioner No.1. The loans extended by the respondent / STCI in favour of the said two companies are the following: -

1. **Cedar Account** : Rs. 50/- crores Loan extended vide Sanction letter dated September 29, 2010 and Facility Agreement dated November 17, 2010. Loan secured by pledge of 1,40,62,000 shares of M/s Tulip Telecom Limited (TTL, for short)) another company promoted by the petitioner No.1.

2. **Sukhmani Account** : Rs. 50/- crores Loan extended vide Facility Agreement dated February 10, 2012. Loan secured by pledge of around 1,37,00,000 shares of TTL.

3. It is the case of the petitioners that out of the total pledged shares of TTL, 40,09,000 shares were invoked by the respondent / STCI in the account of Cedar and the value of such invoked shares on the date of invocation was Rs.27,76,35,284/-. In the account of Sukhmani 1,01,50,000 shares of TTL were invoked by respondent / STCI. Value of such invoked shares was Rs. 48,95,93,596. Total value of invoked shares in both the accounts was Rs.76,72,28,880/-.

4. It is the case of the petitioners that besides such invocations, credit of which ought to have been given in both the accounts of Cedar and Sukhmani, certain payments were also made in the said accounts. In the account of Cedar, Rs.10,97,11,034/- was deposited from time to time and in the account of Sukhmani, Rs. 6,52,88,416/- was deposited. It is the case of the petitioners before the learned Arbitrator that despite having invoked the above-mentioned quantity of shares, no credit of the same was given in the accounts

of both Cedar and Sukhmani. Instead, it was represented by the respondent / STCI that both the accounts of Cedar and Sukhmani are under default and to prevent them from being declared as Non-Performing Assets ('NPA', for short), the petitioners should further avail a loan of Rs. 15/- Crores and pay the same back to respondent STCI for due adjustments in the accounts of Cedar and Sukhmani.

5. It is the case of petitioners that against the accounts of Cedar as well as Sukhmani, both the petitioners stood as guarantors. Hence, respondent / STCI forced the guarantors in both these accounts to take a personal loan of Rs. 15/- Crores so that the same can be adjusted in the accounts of Cedar and Sukhmani. It is also the case of the petitioners before the learned Arbitrator that there were no outstanding dues in the accounts of Cedar and Sukhmani; since it is a well settled principle of law that once the shares are invoked, under the provisions of the Depositories Act, 1996 the same are automatically transferred from the Demat Account of the pledger to the Demat account of the pledgee and the pledgee becomes the beneficial owner of the same. Hence, on the same day, credit to the extent of the value of such shares is liable to be given to the pledgor / borrower. The petitioners' case is that above-mentioned submissions were duly incorporated in the SOD filed by the petitioners before the Ld. Arbitrator. However, due to inadvertence the petitioners did not seek the relief of *'equitable set-off'*. It is noted that on August 27, 2019 the respondent / STCI filed its Statement of Claim ('SOC', for short). On November 14, 2019 the petitioners filed their SOD before the Ld. Arbitrator. Thereafter, on January 08, 2020 the Ld. Arbitrator framed issues. Subsequently

the matter was listed on February 13, 2020 on which date the arbitration proceedings were adjourned for evidence of the petitioners for March 14, 2020. There was a request made by respondent on March 13, 2020 for adjournment and the proceedings were adjourned to April 18, 2020.

6. Thereafter, lock-down was imposed in Delhi due to COVID-19 situation. It is the case of the petitioners that on June 15, 2020 the petitioners filed an application seeking to amend the SOD. By virtue of the said amendment, *equitable set-off* was sought to be added in the SOD thereby seeking to adjust the Rs. 15.00 Crores, returned on the same day to STCI as was received by the petitioners. This was on account of the fact that there were no outstanding dues in the accounts of Cedar and Sukhmani. According to the petitioners, vide the impugned award dated October 17, 2020 merely on the ground of delay, the amendment application of petitioners was dismissed by the Ld. Arbitrator. According to the petitioners, there was no undue delay in filing the said application in as much as, even the evidence of the respondent / STCI has not commenced. In fact, from March, 2020 onwards, there was a lock down imposed and hence utmost, there was a delay of three and a half months to four months in filing the application for amendment. So the delay, if any, ought not to have been treated as one, which would necessitate closing the right of the petitioners to claim *equitable set-off* and leave them remediless as their substantial rights have been finally adjudicated upon by the Ld. Arbitrator.

7. It is the submission of Mr. Ashim Vachher, learned counsel appearing for the petitioners that the conclusion of the learned Arbitrator that the amendments sought in the SOD are belated is clearly erroneous as the learned Arbitrator is not bound by the strict principles of CPC and hence ought to have allowed the amendments to the SOD. According to him, Section 23 (3) of the Act of 1996, is abundantly clear in as much as, the Act itself provides for amendment of the claim or the defence during course of arbitral proceedings i.e., anytime during the pendency of the arbitral proceedings. In support of his submissions, he has relied upon the judgment of the Kerala High Court in the case of ***K.K. Scaria v. N Mohandas and others OP(C) No. 54 of 2015 (O),*** wherein it was categorically held that a bare perusal of Section 23 (3) of the Act of 1996 shows that the provision is very wide, much wider than the provisions as contained in the CPC. Similar view was also expressed by this Court in the case of ***Cinevistaas Ltd. v. Prasar Bharti, 2019 SCC OnLine Del 7071***. According to him, even otherwise it is a settled principle of law that the amendments to the written statement are to be granted more liberally than the amendment to the plaint. This is especially in view of the fact that the petitioners herein had not introduced any new defence compared to what had originally been pleaded in the SOD. The amendment to the SOD, as sought by the petitioners, is in the nature of *equitable set-off*, which defence was already taken in the SOD. Hence, no prejudice would have been caused to the respondent in case the amendment would have been allowed by the learned Arbitrator. According to him, in the case of ***State of Bihar v. Modern Tent***

House and Another, (2017) 8 SCC 567, the Supreme Court has held that an amendment to the written statement ought to have been allowed even after the conclusion of plaintiff's evidence. He has also relied upon the judgment of the Supreme Court in the case of ***Baldev Singh v. Manohar Singh, (2006) 6 SCC 498***.

8. That apart, Mr. Vachher has submitted that the law with respect to *equitable set-off* is well settled. *Equitable set-off* is independent of the provisions of CPC. According to him, the following requirements have to be met for the claim of equitable set off:

i. Mutual debts and credits or cross-demands must have arisen out of the same transaction or to be connected in the nature and circumstances;

ii. Such a plea is raised not as a matter of right; and

iii. It is the discretion of the Court to entertain and allow such a plea or not.

9. He stated, in the facts of the present case all the three criteria as detailed above are satisfied. The parties are the same. The petitioners are also guarantors against the accounts of Cedar and Sukhmani. The loan was forced on the petitioners to be adjusted in the accounts of Cedar and Sukhmani so that both the accounts may not be declared NPA. Hence, both the transactions are intricately connected with each other. He relied upon the following judgments in support of his submission: -

1. Jitendra Kumar Khan v. Peerless General Finance, (2013) 8 SCC 769.

2. Peerless General Finance v. Jitendra Kumar Khan, MANU/WB/0261/2004.

10. Thus, he seeks the reliefs as prayed for in this petition by setting aside of interim award / order dated October 17, 2020.

11. On the other hand, Mr. Atul Sharma, learned counsel appearing for the respondent / STCI would contest the maintainability of the petition inasmuch as the order passed by the learned Arbitrator dismissing an application for amendment of pleading does not amount to interim / partial award and hence, cannot be challenged by way of a petition under Section 34 of the Act of 1996. In this regard, his submissions were the following: -

(i) An interim award has to be on a matter with respect to which final award can be made. Thus, an interim award has to be in the nature of part decree as envisaged under Section 2 (2) CPC, which conclusively determines the rights of the parties on a matter in controversy in the suit. Whereas in the present case the impugned order does not determine the rights of the parties conclusively and only dismisses the application of the petitioner on the ground of delay.

(ii) Moreover, the impugned order relates to rejection of the petitioners' application seeking amendment of their written statement which clearly is a procedural matter and does not decide any issue for adjudicating the disputes between the parties.

(iii) Furthermore, one of the other reasons why orders pertaining to procedural aspects are not up for challenge in terms of Section 34 is the legislative intent behind the enactment of the Act of 1996. The purpose of the act was to minimize the intervention of the

Courts during arbitral proceedings and that is why Section 5 of the Act of 1996 prohibits the Courts from interfering in the arbitration process. In support of his submissions, he has relied upon the judgments in the cases of (i) ***Container Corporation of India Ltd. v. Texmaco Ltd., 2019 SCC OnLine Del 1594; (ii) Shyam Telecom Ltd. v. Icomm Ltd., 2010 (116) DRJ 456; (iii) Rhiti Sports Management Pvt. Ltd. v. Power Play Sports & Events Ltd., 2018 SCC OnLine Del 8678; (iv) ONGC Petro Additions Ltd. v. Tecnimont S.P.A & Ors., 2019 (5) Arbitration Law Reporter 305 (Delhi).***

12. That apart, it is the submission of Mr. Sharma that the learned Arbitrator has rightly dismissed the application and there is no illegality in the impugned order, as the trial of the claim has commenced with the filing of the evidence affidavit. He also stated that it is a trite law that amendment should not be allowed after the commencement of trial except in rare circumstances such as discovery of a new fact or that which was not within the knowledge of the party seeking amendment at the time of filing of the pleadings, which is not the case of the petitioners. In fact, in contradistinction to this, the petitioners herein were well aware of the facts of the case and their rights and chose not to prefer any set off at the filing of the SOD and therefore, are now precluded from raising any such plea. Moreover, the basic concomitant, while allowing an application seeking amendment of pleadings under Section 23(3) of the Act of 1996 read with Order VI Rule 17 CPC, is an explanation of delay by citing sufficient cause as to why the amendment, which is sought to be incorporated could not be

incorporated earlier. However, the application of the petitioner apart from not giving any sufficient cause has failed to give any reasons whatsoever explaining such delay why the proposed amendments could not be incorporated earlier. At last, he stated that the petition is an attempt to delay the proceedings before the learned Arbitrator.

13. Mr. Vachher in his rejoinder submissions stated, insofar as the plea of the learned counsel for the respondent raising objection on the maintainability of the petition is concerned, the said plea is totally untenable and in fact the issue is covered by the judgment of this Court in the case of ***Cinevistaas Ltd. (supra).*** Furthermore, in the case of ***Indian Farmers Fertilizers Cooperative Ltd. v. Bhadra Products (2018) 2 SCC 534***, the Supreme Court has categorically held that Section 34 petition is maintainable against an interim award passed by the learned Arbitrator. He also stated that the reliance placed by the respondent on the judgment of the ***Container Corporation of India Ltd. (supra)*** is clearly distinguishable on facts and in fact, this Court in ***Cinevistaas Ltd. (supra)*** has duly considered the judgment in the case of ***Container Corporation of India Ltd. (supra)*** and distinguished the same, inasmuch as the amendment application in ***Container Corporation of India Ltd. (supra)*** was filed at the stage of final arguments.

14. Mr. Vachher also stated that the judgment in the case of ***Rhiti Sports Management Pvt. Ltd. (supra)*** relied upon by Mr. Sharma is also distinguishable on facts, inasmuch as, an application under Order VIII Rule 1A (3) of CPC was filed before the Ld. Arbitrator for taking on record some additional documents. Such an

application was dismissed by the learned Arbitrator against which Section 34 petition was filed. Under these facts this Court held that this would tantamount to a procedural order and no substantive rights of the parties were determined.

15. Even the reliance placed by Mr. Sharma on a Coordinate Bench judgment of this Court in ***ONGC Petro Additions Ltd. (supra)*** is also not applicable in the facts of this case, inasmuch as in the said case also the challenge in a petition under Section 34 of the Act of 1996 was to an order of the Arbitral Tribunal disallowing filing of the additional documents.

16. Similarly, Mr. Vachher stated that the judgment relied upon by Mr. Sharma in the case of ***Shyam Telecom Ltd. (supra)*** is also distinguishable on facts, inasmuch as in the said case, the amendment application sought to introduce a case of fraud allegedly committed by the opposite party. It was held by this Court that the view of learned Arbitrator that the application to be not bonafide is justified in the facts and circumstances of the said case. In the end, Mr. Vachher stated that the present petition needs to be allowed and interim award / order dated October 17, 2020 need to be set aside.

17. Having heard the learned counsel for the parties, the issue which arises for consideration is whether the learned Arbitrator was justified in rejecting the application filed by the petitioners seeking amendment to the SOD.

18. An issue of maintainability of the petition under Section 34 of the Act of 1996 has been raised by Mr. Sharma stating that the impugned order is only a procedural order and not an interim award so as to be maintainable under Section 34 of the Act of 1996. The

said submission has been countered by Mr. Vachher by relying upon the judgment of the Coordinate Bench of this Court in ***Cinevistaas Ltd. (supra)*** wherein the Coordinate Bench dealt with a preliminary issue on the maintainability of the petition raised by the respondent therein. The challenge before the Coordinate Bench was of an order challenging the application for amendment seeking additional claims after 54 months of the commencement of the arbitration proceedings. The learned Arbitrator dismissed the said application against which Section 34 petition was filed before this Court and the Court in paras 22, 23, 24, 28, 29 and 35 held as under:-

"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 (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 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.

XXX XXX XXX

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.

XXX XXX XXX

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."

(Emphasis Supplied)

19. I am of the view that Mr. Vachher is justified in relying upon the judgment in the case of ***Cinevistaas Ltd. (supra)*** and the impugned dated October 17, 2020 passed by the learned Arbitrator is in the form an interim award, making this petition maintainable.

20. Insofar as the judgment relied upon by Mr. Sharma in the case of ***Container Corporation of India Ltd. (supra)*** is concerned, the said judgment was also dealt with by the Coordinate Bench of this Court in ***Cinevistaas Ltd. (supra)*** wherein the Court has distinguished the ***Container Corporation of India Ltd. (supra)*** on facts, inasmuch as in the application for amendment was filed at the stage of final arguments.

21. The reliance placed by Mr. Sharma in the case of ***Rhiti Sports Management Pvt. Ltd. (supra)*** is concerned, the said judgment has no applicability as the order, which was challenged before the Court under Section 34 therein, was on an application under Order VIII Rule 1A (3) of CPC for taking on record some additional documents. Surely, an application for taking on record additional documents is different from an application seeking amendment of the SOD, more particularly by way of an *equitable set-off*, as by rejecting the latter, the claim of the petitioner with regard to *equitable set-off* would attain finality. In fact, the relevant paragraphs, as reproduced by me in paragraph 19 clearly hold such.

22. Similarly, in the judgment in ***Shyam Telecom Ltd. (supra)*** the said judgment is also distinguishable on the peculiar facts of that case; as in the present case, by the rejection of the application for amendment of the SOD by the learned arbitrator, the claims raised by the petitioner has attained finality without considering the plea of *equitable set off*. In fact, in Shyam Telecom Ltd. (supra), the coordinate Bench as categorically held that an interim Award takes colour from Section 2(2) of CPC and Section 31 (6) of the Act and has to conclusively determine the rights of the parties on a matter in controversy as done in a final Award, which is in tune with my conclusion above.

23. Insofar as the submissions made by the learned counsel for the parties on the merits of the amendment are concerned, I may state here that by the application filed by the petitioners, they intended to incorporate paragraphs 22A, 22B, 23A, 23B, 23C, 23D and 41A and statement of *equitable set-off* comprising of seventeen

paragraphs and the prayer clause. The learned Arbitrator while rejecting the said application, has in para 5, stated as under:-

> *"5. Section 23 (3) of the Arbitration and Conciliation Act, 1996 provides that unless otherwise agreed by the parties, either party may amend or supplement his claim or defence during the course of the arbitral proceedings, unless the arbitral tribunal considers it inappropriate to allow the amendment or supplement having regard to the delay in making it. The Claimant is right in contending that all the material on which the plea of equitable set-off is being urged by the Respondents was available with the Respondents when they filed their Statement of Defence. Nothing prevented the Respondents from including the plea (whether tenable or not) in the Statement of Defence filed by them on 14/11/2019. The application for amendment of the Statement of Defence was filed by the Respondents on 15/06/2020, about 7 months after the filing of the Statement of Defence. But, the application does not indicate any reason as to why the plea was not taken or could not have been taken in the Statement of Defence filed on 1411112019. No particulars explaining the delay have been given. This being the position, I consider it inappropriate to allow the amendment having regard to the delay in making it having regard to the fact that arbitration proceedings are time limited proceedings."*

24. The reasoning given by the learned Arbitrator in rejecting the application is that the application does not indicate any reason as to why the plea was not taken or could not have been taken in the SOD filed on November 14, 2019. In other words, no particulars explaining the delay have been given detailed. It is noted that the respondent has filed its SOC on August 27, 2019. The petitioners have filed their SOD on November 14, 2019. Thereafter, on January 08, 2020 the Ld. Arbitrator framed issues. Subsequently, the matter was listed on February 13, 2020 on which date the

arbitration proceedings were adjourned for evidence on March 14, 2020. There was a request made by respondent on March 13, 2020 for adjournment and the proceedings were adjourned to April 18, 2020. Thereafter, because of lock-down due to COVID-19 situation, no proceedings could take place. Immediately on June 15, 2020 the petitioners filed an application thereby seeking to amend the SOD. No doubt, the respondent has filed its evidence by way of affidavit and it appears that the matter is at the evidence stage of the claimant, respondent herein.

25. I find that the filing of the application being in the month of June, 2020 and not many proceedings have taken place after filing of the SOD. Moreover, the only development which has effectively taken place is the framing of issues by the learned Arbitrator and filing of the evidence by the respondent. So, the delay is not fatal.

26. Further, the plea of the petitioners for *equitable set-off*, is primarily with regard to Rs.15 Crores of loan advanced by the respondent in the two loan accounts. It is the petitioners' case before the learned Arbitrator that there was no outstanding dues in the account of Cedar and Sukhmani. That apart, they are seeking adjustment of Rs.15 Crores, which was taken as loan from the respondent and returned on the same day to the respondent as was received by the petitioners.

27. In the judgment in the case of ***Cinevistaas Ltd. (supra)*** on which reliance was placed by Mr. Vachher, in paragraph 35, which I have already reproduced above, the Coordinate Bench has held that as long as the disputes fall broadly within the reference, correction and amendment ought to be permitted as the principles as laid down

by the Supreme Court in ***Shah Babulal Khimji v. Jayaben D. Kania, (1981) 4 SCC 8,*** would have a greater application in arbitral proceedings as the said judgment lays down principles that the substantive rights affected ought to be seen, while determining what kind of orders are challengeable.

28. That apart, Mr. Vachher is also right in relying upon the judgment of the Kerala High Court in ***K.K. Scaria (supra),*** wherein the Kerala High Court has upheld the order passed by the learned Arbitrator allowing the application for amendment by stating as under:-

> *"6. The court below has noticed that the power of allowing the amendment as far as an Arbitrator is concerned, is considerably wide and the restriction available is under Section 23(3) of the Arbitration and Conciliation Act, 1996. That provision reads as follows:*
>
> > *"23. Statement of claim and defence.—*
> >
> > *xxxxxxxxxxxxxxx*
> >
> > *(3) Unless otherwise agreed by the parties, either party may amend or supplement his claim or defence during the course of the arbitral proceedings, unless the arbitral tribunal considers it inappropriate to allow the amendment or supplement having regard to the delay in making it."*
>
> *7. A bare perusal of the above provision shows that as rightly concluded by the Arbitrator, the discretion to allow amendment is considerably wide and is not circumscribed as in the case of a suit*

by the provisions of the C.P.C. The contention taken before this Court is that the Arbitrator ought to have found that the amendment sought for is inappropriate."

29. Even the judgment on which reliance has been placed by Mr. Vachher in the case of ***State of Bihar (supra)*** and ***Baldev Singh (supra),*** the Supreme Court; had allowed the amendment to the written statement even after the conclusion of the plaintiff's evidence. Similarly, in the case of ***Jitendra Kumar Khan (supra)*** the Supreme Court upheld the order of the Division Bench of the Calcutta High Court allowing the appeal of the respondent challenging the order of the learned Single Judge not allowing the amendment to the written statement incorporating a counter claim. That apart, in the case in hand, what is important is by such a rejection, the substantive rights of the petitioners have been decided, which means that the petitioners cannot in future claim the relief as they have sought for by way of an amendment.

30. The plea of Mr. Vachher that the case in hand has all the ingredients of *equitable set-off* so as to be allowed to be incorporated in the SOD is concerned, I refrain from commenting on the same; as such a plea by the petitioner and also the plea against *equitable set-off* by the respondent can be raised once such a claim is incorporated in the SOD.

31. Accordingly, the present petition is allowed, the petitioner is allowed to incorporate the amendments as sought for by them in the SOD, subject to payment of costs of Rs. 1 lakh to the respondent. The amended SOD shall be filed within 10 days from today.

32. The petition is disposed of.

I.A. 10618/2020

Dismissed as infructuous.

V. KAMESWAR RAO, J

DECEMBER 07, 2020/*ak*