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

Date of decision: 20th August 2024

\+ O.M.P. (COMM) 216/2020

APTEC ADVANCED PROTECTIVE TECHNOLOGIES AG
..... Petitioner

Through: Mr. Ashish Dholakia, Senior Advocate with Mr. Akash Panwar & Mr. Rohan Chawla, Advocates.

versus

UNION OF INDIA & ANR ..... Respondents

Through: Ms. Mamta Tiwari with Ms. Veronica Mohan, Advocates.

CORAM:
HON'BLE MR. JUSTICE ANUP JAIRAM BHAMBHANI

J U D G M E N T

ANUP JAIRAM BHAMBHANI J.

By way of the present petition filed under section 34 of the Arbitration & Conciliation Act 1996 ('A&C Act'), the petitioner impugns what it claims is an interim award dated 18.11.2010 made by the learned Sole Arbitrator, by which the learned Arbitrator has dismissed 04 applications filed by the petitioner (claimant in the arbitral proceedings) seeking discovery of certain documents from respondent No. 1. For completeness of record, it must be noted that, to begin with, the learned Arbitrator had been arrayed as respondent

No. 2 in the present petition; but subsequently *vide* order dated 04.12.2014 made by this court, the name of the learned Arbitrator was deleted from the array of party-respondents in the present proceedings, thereby leaving only one respondent in the matter.

2. Notice on this petition was issued on 22.03.2011; consequent to which the respondent has filed reply dated 19.08.2011. The petitioner has also filed rejoinder dated 25.08.2011 to such reply.

3. A summary of the 04 applications bearing I.A. Nos. 1, 2, 3 and 4 of 2009 filed by the petitioner before the learned Arbitrator, including the documents sought by the petitioner, the respondent's response thereto and the Tribunal's findings thereon, may be summarized as follows :

I.A. No.	**Document sought by the claimant (petitioner) from the non-claimant (respondent)**	**Respondent's response**	**Tribunal's findings**
1 of 2009 filed on 07.04.2009	Document No. 1 : Acceptance Test Procedures adopted as per SOP-Standard Operating Procedures of DGQA specific to Multipurpose Mountaineering Boots and Joint Receipt Inspection Reports – Nov 1999 to Jan 2000	Document not available with the respondent	Document No.1 does not exist since the boots were inspected visually. Therefore, not possible to call for production of document No. 1.

	Document No. 2 : Defect Investigation Report and Scientific Laboratory Test Methodology with List of Applicable Standards for Model 'A' Boot purported to have been defective with regard to 'sole erosion' – Nov 2000 to June 2002	Document supplied	Documents Nos. 2 and 3 had already been filed by the respondent in Volume-II of their documents. The competent authority under the R.T.I. Act has already furnished full text of the report sought for as Document No. 4. Hence, no further orders necessary.
	Document No. 3 : Defect Investigation Report and Scientific Laboratory Test Methodology with List of Applicable Standards for comparative testing of Model 'A' (purported to be defective) and Model 'B' (accepted) with regard to 'sole erosion' – Nov 2000 to June 2002	Document supplied	
	Document No. 4 : Reports of the visit of DGQA Team to Units under XIV Corps c/o 56 APO – In connection with purported defect of Boot Koflach being used in Siachen Glacier area plus other items like Crampons, Gloves, Ice Pick, Ice Pitons, Jummar, Rope Climbing etc. – 2nd Feb to10th Feb 2001	Relevant pages of document supplied under RTI – remaining part of the report claimed to be confidential and sensitive	

I.A. No.	Document sought by the claimant (petitioner) from the non-claimant (respondent)	Respondent's response	Tribunal's findings
2 of 2009 filed on 17.06.2009	Production of Field Trial Report of December, 1998 pertaining to the Model 'A' Boot	Respondent had supplied the document to the Tribunal for consideration	A copy of the Report was produced by the respondent before the Tribunal; and the Tribunal found that the respondent had conducted Trial test on only 3 sets of Boots. The Tribunal noted that it was stated in the report that the tests were done on the 03 pairs of shoes, which was on a limited scale which did not represent the exhaustive view of users to the meagre number of samples given for users trials. For this reason, the Tribunal was of the opinion that the Field Test Reports, 1998 need not be supplied to the claimant.

I.A. No.	Document sought by the claimant (petitioner) from the non-claimant (respondent)	Respondent's response	Tribunal's findings
3 of 2009 filed on 07.07.2009	<u>Document No. 1</u> : Field Trial Directive for Boot Crampon with Straps – 1990 to 1991	Not available with the respondent as the document was very old	Prayer for production of Documents Nos. 1 and 2 is rejected as they are in the nature of fishing and roving enquiry. Documents Nos. 3 and 4 are privileged since they pertain to supplies to the Army. Since the Army considers that details of such equipment cannot be divulged, the Tribunal cannot deviate from the opinion of the concerned authority. Further no case of incompatibility of crampons is made-out.
	<u>Document No. 2</u> : Field Trial Report of Boot Crampons with Straps – December 1990	Not available with the respondent as the document was very old	
	<u>Document No. 3</u> : Contract Purchase Order placed on M/s. JAMDPAL of France for supply of 10,000 Pairs of Boot Crampons with Straps – June to July 1999	Confidential document entered into by the respondent with a third-party; and not relevant for the proceedings.	
	<u>Document No. 4</u> : Acceptance Test Procedures adopted as per SoP-Standard Operating Procedures of DGQA specific to Boots Crampons with Straps and Joint Receipt Inspection Reports of Boot Crampons with Straps Qty 10,000 Pairs supplied by M/s. JAMDPAL of France – June 1999 to January 2000	Confidential information, with direct bearing on the defence and security of the country.	

I.A. No.	Document sought by the claimant (petitioner) from the non-claimant (respondent)	Respondent's response	Tribunal's findings
4 of 2009 filed on 19.08.2009	Details of investigation carried-out by AHSP pertaining to Crampons pursuant to report of DGQA team based on its visit between 02.02.2001 and 10.02.2001 to Units under XIV Corps c/o 56 APO and complete correspondence on subject matter as well as action undertaken by CQA after 10th Feb 2001	Not pleaded by the claimant	The application is belated and liable to be dismissed in view of judgment of the Delhi High Court in ***Bhatia Plastics vs. Peacock Industries Ltd.***, AIR 1995 Del 144 The production of these documents cannot be allowed since the application is in the form of a fishing and roving inquiry.
	Photographs of Boot Crampons with straps procured from M/s JAMDPAL of France (manufacturer M/s Camp, Italy) – June 1999 to Jan 2000.	Not pleaded by the claimant	

4. To give a brief overview of the dispute, it may be observed that the petitioner, a Swiss company, had filed a claim against the respondent for non-payment of the price of boots supplied by them to the respondent *inter-alia* for ice-wall climbing by soldiers at the Siachen Glacier; which boots were rejected by the respondent contending that the boots supplied were defective. On the other hand, the petitioner's contention was that it was not the boots that were defective, but the obsolete crampons that the respondent had attached to the boots which were not according to the required safety standards, which

crampons had been procured by the respondent from a different supplier.

5. At the outset, the respondent has raised a preliminary objection as to the maintainability of the present challenge under section 34 of the A&C Act, submitting that decision dated 18.11.2010 made by the learned Arbitrator does not amount to an 'interim award' and hence cannot be challenged under section 34. Addressing this objection, Mr. Ashish Dholakia, learned senior counsel appearing for the petitioner has argued that by way of decision dated 18.11.2010, the learned Arbitrator has – in effect – finally decided an aspect of the dispute between the parties, *viz.* the question of whether the crampons manufactured by M/s Camp and Co. and supplied by M/s JAMDPAL and Co. were satisfactory in quality and not incompatible with the boots; and that the learned Arbitrator has thereby prejudged a part of the petitioner's claim on merits. It is argued that for the said reason, the decision dated 18.11.2010 rendered by the learned Arbitrator is an interim award, which is amenable to challenge under section 34 read with section 31(6) of the A&C Act.

6. To that end, Mr. Dholakia has drawn the attention of this court to the following portion of the impugned decision :

> *"From the above material before the Arbitral Tribunal, it is clear that there is evidence that the Crampons supplied by M/s.JAMDPAL & Co., to the respondent were satisfactory and that there is no basis or material to the contrary and hence the allegation in I.A.3/2009 that the Crampons supplied by JAMDPAL & Co., and used by the respondent were 'incompatible', is not correct."*

7. It is argued that in view of the above observations, while deciding the petitioner's applications seeking discovery of documents, the learned Arbitrator has pre-decided that the crampons which were attached to the boots 'were satisfactory' and that the allegation that the crampons 'were incompatible' with the boots is not correct.

8. In support of his contention Mr. Dholakia has invited the attention of this court to the decision of the Supreme Court in ***Indian Farmers Fertilizers Cooperative Limited vs. Bhadra Products***,[1] in particular to the following extract of that judgement :

> "*8. 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.*

[1] (2018) 2 SCC 534

"*9. 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.*

* * * * *

"*13. In Satwant Singh Sodhi v. State of Punjab [Satwant Singh Sodhi v. State of Punjab, (1999) 3 SCC 487], an interim award in respect of one particular item was made by the arbitrator in that case. The question before the Court was whether such award could be made the rule of the Court separately or could be said to have been superseded by a final award made on all the claims later. This Court held : (SCC p. 491, para 6)*

> *"6. The question whether interim award is final to the extent it goes or has effect till the final award is delivered will depend upon the form of the award. If the interim award is intended to have effect only so long as the final award is not delivered it will have the force of the interim award and it will cease to have effect after the final award is made. If, on the other hand, the interim award is intended to finally determine the rights of the parties it will have the force of a complete award and will have effect even after the final award is delivered. The terms of the award dated 26-11-1992 do not indicate that the same is of interim nature."*

On the facts of the case, the Court then went on to hold : (Satwant Singh case [Satwant Singh Sodhi v. State of Punjab, (1999) 3 SCC 487], SCC p. 493, para 11)

> *"11. This Court in Rikhabdass v. Ballabhdas [Rikhabdass v. Ballabhdas, AIR 1962 SC 551 : 1962 Supp (1) SCR 475] held that once an award is made and signed by the arbitrator, the arbitrator becomes functus officio. In Juggilal Kamlapat v. General Fibre Dealers Ltd. [Juggilal*

Kamlapat v. General Fibre Dealers Ltd., AIR 1962 SC 1123 : 1962 Supp (2) SCR 101] this Court held that an arbitrator having signed his award becomes functus officio but that did not mean that in no circumstances could there be further arbitration proceedings where an award was set aside or that the same arbitrator could never have anything to do with the award with respect to the same dispute. Thus, in the present case, it was not open to the arbitrator to redetermine the claim and make an award. Therefore, the view taken by the trial court that the earlier award made and written though signed was not pronounced but nevertheless had become complete and final, therefore, should be made the rule of the court appears to us to be correct with regard to Item 1 inasmuch as the claim in relation to Item 1 could not have been adjudicated by the arbitrator again and it has been rightly excluded from the second award made by the arbitrator on 28-1-1994. Thus the view taken by the trial court on this aspect also appears to us to be correct. Therefore, the trial court has rightly ordered the award dated 28-1-1994 to be the rule of the court except for Item 1 and in respect of which the award dated 26-11-1992 was ordered to be the rule of the court."

It is, thus, clear that the first award that was made that finally determined one issue between the parties, with respect to Item 1 of the claim, was held to be an interim award inasmuch as it finally determined Claim 1 between the parties and, therefore, could not be re-adjudicated all over again."

9. Learned senior counsel appearing for the petitioner has also cited the judgement of the Supreme Court in ***National Thermal Power Corporation Limited vs. Siemens Atkeingesellschaft*** [2] and the judgement of the Delhi High Court from which the said matter arose before the Supreme Court, *viz.* ***National Thermal Power Corporation***

[2] (2007) 4 SCC 451 at paras 19 & 20

Ltd. (NTPC) vs. Siemens Atiengesellschaft (SAG)[3], to submit that the said two decisions lay down essentially the same principle of law as in the *Indian Farmers Fertilizers* (supra).

10. On the other hand, Ms. Veronica Mohan, learned counsel for the respondent argues, that a more complete reading of the impugned decision would show that in the impugned decision itself the learned Arbitrator has clarified that his decision on the four applications is intended *only* to address the allegations made by the petitioner in those applications; and that the disputes in the main arbitration case will be decided subsequently, based upon the evidence that comes forth in the matter and the arguments presented on behalf of the parties; and that therefore the impugned decision does not amount to an interim award and is not amenable to challenge under section 34 of the A&C Act.

11. In this behalf, Ms. Mohan draws attention to the following portions of the impugned decision of the learned Sole Arbitrator :

> "*Before concluding, I invite the attention of the parties to the "Note" set out in I.A.3/2009 before starting the discussion on the Points of that I.A. What I said in that Note applies equally to the discussion in I.A.4/2009. Therefore, any observations touching on the contentions of the parties in the main pleadings in the arbitration case, have become necessary in these two I.As 3 and 4/2009 only to meet the allegations and points raised by the claimant in these I.As and but for the same, I would not have made any observations concerning the allegations in the main arbitration case.* ***It is made clear that the allegations in the main arbitration case will be decided on the basis of the evidence and the***

[3] 2005 (83) DRJ 46 at para 33

arguments relevant there for in the light of the issues already framed and that will be done without reference to any observations in I.As 1 to 4 of 2009.

"*Before parting with these IAs, I would like to state that while the main issue in the arbitration case, namely, Issue No.6 is as to "whether the Model 'A' Boots supplied by the claimant were defective or substandard", the claimant has come forward with these IAs as if there was an issue in the opposite direction as to "whether the Crampons used by the respondent on the Model 'A' Boots were 'incompatible'", and that approach, in my view, amounts to doing violence to the Issue no.6 framed out of Draft issue No.8 prepared by the claimant itself."*

(emphasis supplied)

12. Ms. Mohan has also cited the observations made by the learned Arbitrator in a subsequent order/minutes of meeting dated 05.04.2011, which clarifies that the impugned decision dated 18.11.2010 was not an award but was only an order, in the following words :

"At the meeting on 23rd March, 2011 the learned counsel for the claimant Mr. Ashish Dholakia filed an Application for adjournment of the proceedings. In the said application it has been stated that against the "award" dated 18-11-2010 passed by the Arbitral Tribunal, the claimant filed an application under Sec.34 of the Arbitration and Conciliation Act, 1996 as OMP 225/2011 before the Hon'ble Delhi High Court and further that the Hon'ble High Court had issued notice but did not grant stay of the proceedings before the Arbitral Tribunal and the Court listed the matter to come up on 23rd May, 2011.

"The above statement of the claimant requires clarification by the Tribunal. The statement made by the claimant in the Application dated 23-3-2011 while seeking adjournment of the proceedings before the Tribunal that the Tribunal had passed an "award" on 18-11-2010, it must be pointed-out, is an incorrect statement. The Tribunal did not pass any award on 18-11-2010 nor

> *did it use the word "award" in its said order as wrongly claimed by the claimant in the said adjournment Application. The Arbitral Tribunal had only passed orders on 4 IAs filed by the claimant seeking to apply Order 11 Rule 12 and 14 of the Code of Civil Procedure, 1908 for discovery and inspection."*

13. It is accordingly the respondent's contention that the impugned decision dated 18.11.2010 only decides the four applications filed by the petitioner seeking production of documents and nothing else, especially since the learned Arbitrator has expressly clarified that a decision on the main dispute in arbitration would be made after permitting the parties to complete their evidence and after hearing arguments on the merits of the matter. It is therefore submitted that the petitioner's contention that by way of the impugned decision dated 18.11.2010the learned Arbitrator has foreclosed or pre-decided the petitioner's claims, or that the decision on such claims is a foregone conclusion, is misconceived and baseless.

14. Before deciding the rival contentions of the parties, this court must observe that regrettably a challenge filed before this court on 17.03.2011 to a decision made by the learned Arbitrator on 18.11.2010, has remained pending here for an inordinately long period of time.

15. Upon considering the rival arguments made, this court is of the view, that though while deciding the four applications seeking discovery and inspection of documents, the learned Arbitrator has gone into a detailed discussion on several aspects of the disputes between the parties and appears to have drawn inferences and conclusions therefrom, at the same time the learned Arbitrator has also *expressly*

clarified that his decision on the four applications is *not a decision on the merits of the disputes pending in arbitration*. Though it may be said that the manner in which the impugned decision is phrased does create an impression that the learned Arbitrator has expressed a final view as regards the quality of the crampons and their compatibility with the boots, to allay any apprehension that the petitioner may entertain in that behalf, the learned Arbitrator has also specifically recorded in order/minutes of meeting dated 05.04.2011, that he has only passed orders in relation to the discovery and inspection of documents and has not passed any 'award' on the dispute between the parties.

16. It may be beneficial for this court to also notice the judgement of a Co-ordinate Bench of this court in ***Rhiti Sports Management (P) Ltd. vs. Power Play Sports & Events Ltd.***,[4] where the court has explained the attributes of an interim award in the following words:

> *"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.*

[4] 2018 SCC OnLine Del 8678; as approved by a Division Bench in ***Goyal MG Gases (P) Ltd. vs. Panama Infrastructure Developers (P) Ltd. & Ors.***, 2023 SCC OnLine Del 1894

> *"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.*
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> *"18. To put it in the negative, any procedural order or an order that does not finally settle a matter at which the parties are at issue, would not qualify to be termed as "arbitral award".*

17. It is also noticed that in the impugned decision, the learned Arbitrator has, in so many words, acknowledged that the main issue in the arbitration proceedings, namely Issue No. 6 on whether the boots supplied by the petitioner were defective or sub-standard has been specifically framed and is yet to be answered. There is nothing in the impugned decision to indicate that by the said decision, the learned Arbitrator has disposed-of Issue No.6, which is central to the arbitral proceedings. Accordingly, the impugned decision is an order which "*does not finally settle a matter at which the parties are at issue*" and accordingly does not qualify even as an interim award.[5]

18. In the above view of the matter, and taking on record the specific observations of the learned Arbitrator as contained in impugned decision dated 18.11.2010 and in order/minutes dated 05.04.2011, this

[5] *Rhiti Sports Management (P) Ltd.* (supra)

court is of the opinion that the impugned decision dated 18.11.2010 is *not an interim award*, but is only an order on the applications that it disposes-of. Accordingly, the present petition under section 34 of the A&C Act challenging the impugned decision, is not maintainable.

19. The petition is accordingly dismissed.

20. Pending applications, if any, also stand disposed-of.

ANUP JAIRAM BHAMBHANI, J.

AUGUST 20, 2024
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