

Decision Of Arbitrator To Not Implead A Party To Arbitral Proceedings Is Not An "Interim Award" Under The Arbitration Act: Delhi High Court

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Introduction

In a recent decision in *National Highways Authority of India v. IRB Ahmedabad Vadodara Super Express Tollways Pvt. Ltd.*¹, the High Court of Delhi ("**High Court**") held that the decision of an arbitrator to not implead a party to the arbitration is not an "interim award" under the scheme of the Arbitration and Conciliation Act, 1996 ("**Arbitration Act**"). Accordingly, the High Court dismissed a petition filed under Section 34 of the Arbitration Act purporting to challenge the order of the arbitral tribunal refusing to implead a party. In this article, we briefly navigate through the facts and findings in the above-mentioned case.

Brief Facts

By way of a petition filed under Section 34 of the Arbitration Act, the petitioner – National Highway Authority of India ("**NHAI**"), assailed the decision ("**Impugned Order**") of a three-member arbitral tribunal dated 01.08.2022 (further corrected on 02.08.2022).

In the aforesaid Impugned Order characterised by the petitioner as an "*interim award*", the arbitral tribunal rejected an application seeking the impleadment of the State of Gujarat ("**State**") as a party to the arbitral proceedings.

The arbitral proceedings were instituted by the respondent herein seeking adjudication of disputes under a Concession Agreement dated 25.07.2011 ("**Concession Agreement**") entered between the petitioner and the respondent. The respondent filed its claims, and the petitioner filed counterclaims before the arbitral tribunal. In the course of the arbitral proceedings, the petitioner moved an application seeking impleadment of the State on the ground that the State was party to a State Support Agreement dated 11.02.2016, which placed upon it certain obligations with respect to the Concession Agreement. By the Impugned Order dated 01.08.2022, the arbitral tribunal rejected the application on the ground that it did not have the jurisdiction to decide the question of impleadment of the State.

From a factual point of view, the petitioner contended that the Concession Agreement and similar agreements between other concessionaires expressly contemplated the execution of a State Support Agreement with the State and that the petitioner entered into the State Support Agreements pursuant to such provisions. The concerned concessionaires, including the respondent herein, were admittedly not parties to the State Support Agreement between the petitioner and the State. However, the petitioner argued that the State Support Agreement constituted a part of a composite set of documents in relation to the same project, and the State had essentially bound itself to certain obligations of the respondent under the Concession Agreement. In view of these facts, the petitioner argued that the State was effectively a party to the Concession Agreement and ought to have been impleaded to the arbitral proceedings.

¹ *National Highway Authority of India v. IRB Ahmedabad Vadodara Super Express Tollways Pvt. Ltd.*, 2024 DHC 2665.

On maintainability of the petition, the petitioner submitted that the Impugned Order purports to proceed on a point of jurisdiction but decides on a question which has the effect of exonerating the State of any potential liability under the Concession Agreement. Thus, the Impugned Order partakes the character of a final and substantive decision, which is amenable to challenge under the scheme of the Arbitration Act. To support its submissions, the petitioner placed reliance on the decisions of the Supreme Court in *IFFCO v. Bhadra Products*², and *ONGC v. Discovery Enterprises Pvt. Ltd.*³ The petitioner also referred to decisions of the Delhi High Court in *Cinevistaas Ltd. v. Prasara Bharti*⁴ and *NHAI v. Lucknow Sitapur Expressway Ltd.*⁵.

In the proceedings under Section 34 of the Arbitration Act, the respondent took a preliminary objection that the Impugned Order did not constitute an award at all.

As per the respondent, the question of maintainability of a petition under Section 34 of the Arbitration Act against an order of an arbitral tribunal declining impleadment of a third party was no longer a disputed subject. The respondent relied upon the decision in *Lucknow Sitapur*⁶ and a Division Bench judgment of the Delhi High Court in *Goyal MG Gases Pvt. Ltd. v. Panama Infrastructure Developers Pvt. Ltd.*⁷.

Findings

Upon review of the facts of the matter, the High Court was of the view that the present case was covered against the petitioner by the decision in *Lucknow Sitapur*⁸, which case also pertained to disputes arising under a concession agreement. The arbitral tribunal rejected an application by NHAI for impleadment of a state government on the ground that it was a party to a State Support Agreement. In the aforesaid case⁹, the High Court referred to various decisions¹⁰ to come to the conclusion that rejection of the application for impleadment of the State did not constitute an "award" at all. In the said terms, the petition under Section 34 came to be dismissed.

The High Court observed that there is a small factual distinction between the case of *Lucknow Sitapur*¹¹ and the present case, which is that the State Support Agreement in *Lucknow Sitapur*¹² was a tripartite agreement to which the concessionaire was also a party. Whereas, in the present case, the State Support Agreement is between petitioner and the State alone. This distinction, as per the High Court made the case of the petitioner even more precarious in the present case.

² (2018) 2 SCC 534.

³ (2022) 8 SCC 42.

⁴ 2019 SCC OnLine Del 7071.

⁵ 2022 SCC OnLine Del 4527.

⁶ 2022 SCC OnLine Del 4527.

⁷ 2023 SCC OnLine Del 1894.

⁸ 2022 SCC OnLine Del 4527.

⁹ 2022 SCC OnLine Del 4527.

¹⁰ *Chloro Controls India Pvt. Ltd. v. Severn Trent Water Purification Inc.*, (2013) 1 SCC 641; *Rhiti Sports Management Pvt. Ltd. v. Power Play Sports & Events Ltd.*, 2018 SCC OnLine Del 8678.

¹¹ 2022 SCC OnLine Del 4527.

¹² 2022 SCC OnLine Del 4527.

The High Court also opined that the decision in *Goyal MG Gases*¹³ which as per the High Court lent support to the view that the Impugned Order was not an award at all. In *Goyal MG Gases*¹⁴, the Division Bench of the High Court was hearing an appeal against an order of a Single Judge dismissing a petition under Section 34 of the Arbitration Act, which sought to challenge an order of the arbitral tribunal rejecting an application for impleadment of third parties. The Single Judge had dismissed the petition under Section 34 of the Arbitration Act on maintainability as well as on merits. On the question of maintainability, it was held that the application praying for impleadment of third party was not a matter which would dovetail into the final award. The aforesaid reasoning came to be accepted by the Division Bench of the Delhi High Court in *Goyal MG Gases*¹⁵.

In view of the above findings, the High Court was of the opinion that the petition filed by the petitioner under Section 34 of the Arbitration Act was not maintainable. Accordingly, the petition was dismissed.

Conclusion

The High Court's ruling aptly clarifies that an order dealing with issues regarding impleadment of parties would not dovetail into an arbitral award. In absence of an award, it logically follows that challenge proceedings cannot be sustained under Section 34 of the Arbitration Act.

Contact

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¹³ 2023 SCC OnLine Del 1894.

¹⁴ 2023 SCC OnLine Del 1894.

¹⁵ 2023 SCC OnLine Del 1894.