

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

+ **FAO(OS) 507/2007**

Date of Decision : 8th February, 2008

NUMERO UNO INTERNATIONAL LTD. Appellant
Through : Mr. Arun Jaitley, Sr. Adv. with
Ms. Bina Madhvan, Mr. Hemal K. Sheth, Advs.

versus

PRASAR BHARTI Respondent
Through : Mr. Rajeev Sharma, Mr. Abhishek
Birthray, Mr. N.R. Mohapatra, Advs.

CORAM:
HON'BLE MR. JUSTICE T.S. THAKUR
HON'BLE MS. JUSTICE VEENA BIRBAL

1. Whether reporters of local papers may be allowed to see the judgment? Yes
2. To be referred to the Reporter or not? Yes
3. Whether the judgment should be reported in the Digest? Yes

Per THAKUR, J.

Based entirely on the admissions of the appellant company, Justice S.C. Aggarwal, a former Judge of the Supreme Court of India has, acting as sole arbitrator, passed an interim award directing the appellant herein to pay to the respondent Prasara Bharti the admitted amount of Rs.7.69 crores outstanding against the former. Aggrieved by the said interim award, the appellant filed a petition under Section 34 of the Arbitration and Conciliation Act, 1996 before a Single Judge of this Court who has dismissed the same by his order dated 20th August, 2007. The learned Single Judge was of the opinion that the arbitrator had given cogent reasons

for making an interim award in favour of the respondent. He repelled the contention urged on behalf of the appellant that the provisions of Order 12 Rule 6 of the CPC were not applicable and declared that the arbitrator was competent to make an interim award on the admissions of the parties contained either in the pleadings or in the correspondence exchanged between the parties. The Court relied upon two letters, one dated 17th May, 2001 and the other dated 31st May, 2001 to hold that a candid admission had been made by the appellant company as to the outstanding liability of Rs.7.69 Crores. The present appeal calls in question the correctness of the said order.

2. Appearing for the appellant, Mr. Jaitley made a solitary submission before us. He contended that while the arbitrator was correct in holding that the appellant had admitted its liability to the extent of Rs.7.69 Crores, the arbitrator should have, while making an interim award, also kept in view the fact that the appellant had made a counter claim of Rs.25 Crores before him. He submitted that the interim award may have been justified if the appellant had not made any counter claim, but once the counter claim was made, the arbitrator could not have, relying upon the admissions of the appellant, made any interim award or directed payment of the amount, no matter the pleadings and the correspondence on the subject clearly admitted the liability of the appellant to the tune of Rs.7.69 Crores.

3. On behalf of the respondent, it was on the other hand argued by Mr. Sharma that the arbitrator's power to make an interim arbitral award not being in dispute, the only question which fell for consideration was whether the award suffered from any patent illegality or perversity. He drew our attention to Section 2(c) of the Arbitration and Conciliation Act, 1996 to argue that an arbitral award includes an interim award. He placed reliance upon Section 31(6) of the Act to contend that the tribunal may, at any time

during the arbitral proceedings, make an interim arbitral award. He submitted that the arbitrator had, in the instant case, correctly appraised the material on record including the pleadings of the parties and the correspondence which contained a clear acknowledgement of the liability of the appellant to the tune of Rs.7.69 Crores after giving adjustment of the payments made and even the set off claimed by it. The fact that the respondent had made a counter claim could not therefore, argued the learned counsel, make any difference insofar as the power of the arbitrator to make an interim award was concerned. Relying upon the decision of a Division Bench of this Court in ***Cofex Exports Limited v. Canara Bank*** **AIR 1997 Delhi 355**, Mr. Sharma argued that a defendant could not be compelled to plead a set off or make a counter claim. Either one of those could be maintained in an independent action and that even if a set off was claimed or a counter claim made, the Court could, in appropriate cases, direct the same to be tried separately. The pendency of a counter claim before the arbitrator was therefore wholly immaterial for determining whether or not the interim award was legally valid. It was further argued by Mr. Sharma that the counter claim in the instant case was ex-facie frivolous and vexatious in nature and had been raised belatedly only in the arbitral proceedings, long after the making of the admissions in the correspondence exchanged between the parties.

4. We have given our careful consideration to the submissions made at the bar. Section 31(6) of the Arbitration and Conciliation Act, 1996 clearly empowers the arbitral tribunal to make an interim arbitral award on any matter with respect to which it may make a final arbitral award. It reads :

“31. Form and contents of arbitral award. -

- (1) xxxxx
- (2) xxxxx
- (3) xxxxx
- (4) xxxxx
- (5) xxxxx

(6) The arbitral tribunal may, at any time during the arbitral proceedings, make an interim arbitral award on any matter with respect to which it may make a final arbitral award.”

5. In the light of the above, it is not open to the appellant to argue that the interim award made by the arbitrator was incompetent. In fairness to Mr. Jaitley, we must record that he did not question the jurisdiction of the arbitrator to make an interim award as was, it appears, sought to be done before the learned Single Judge at some stage.

6. What then remains to be examined is whether the pendency of a counter claim made by the appellant before the arbitrator was sufficient to dis-entitle the respondent Prasar Bharti from claiming even the admitted amount due from the appellant by way of an interim award in its favour. According to Mr. Jaitley, since the claim made by the respondent and the counter claim of the appellant were eventually to result in a net amount which one or the other party would be required to pay, the payment of any amount which the appellant may have admitted to be due and payable out of the claim made by the respondent would not meet the ends of justice nor was any such payment otherwise necessary. We do not however think so. The legal position as regards the nature of a set off and counter claim was examined in **Canara Bank's case** (supra) and summarised thus:

- “34. The following things are in common in set off and counter claim:
- (1) None should exceed the pecuniary limits of the jurisdiction of the Court;
 - (2) Both are pleaded in the written statement, if the law governing the Court permits such plea being raised by the defendant in the written statement;
 - (3) The plaintiff is expected to file a written statement in answer to a claim for set off or to a counter claim;
 - (4) Even if permitted to be raised, the Court may in appropriate cases direct for set off or counter claim being tried separately;
 - (5) A defendant cannot be compelled to plead a set off nor a counter claim; he may as well maintain an independent action for enforcing the claim forming subject matter of set off or counter claim.
 - (6) Both are liable to payment of court fee under Sch. 1 Art. 1 of Court-fees Act, 1870.
 - (7) Dismissal of suit or its withdrawal would not debar a set

off or counter claim being tried, may be followed by a decree against the plaintiff.”

7. In the light of the above, there is no gainsaying that the making of a counter claim is tantamounting to institution of an independent suit for adjudication of the claim of the defendant. Not only court fee is payable on the counter claim but the counter claim remains unaffected by the withdrawal of the original suit evidently on the principle that the counter claim is a suit in itself. So also the court has always the power to direct a set off or counter claim being tried separately from the original suit. Such being the legal nature and character of a counter claim, its pendency does not denude the arbitrator of the power to make an interim award in the original suit/claim if such an interim award is otherwise justified. What is significant is that the legality of an interim award may be tested by reference to the material on which it is based rather than the areas of dispute that may still call for adjudication between the parties. If an interim award on the basis of material available on record is not justified, the Court may set aside the same under Section 34 of the Act. No interference with an interim award would, however, be permissible only because the defendant has made a counter claim or because some areas of dispute independent of the area covered by the interim award remains to be resolved.

8. The issue can be viewed from yet another angle. The making of the interim award ensures to the party in whose favour the same is made the payment of an amount which is an admitted position payable to it. There is no reason why the payment of what is admittedly due should await the determination of other disputes which may take years before they are finally resolved. If at the conclusion of the arbitral proceedings, the defendant were to succeed in his claim, either wholly or partially, and if after adjustment of the amounts found payable to the plaintiff, any amount is

eventually held payable to one or the other party, the arbitrator can undoubtedly make such an adjustment and direct payment of the amount to one or the other party, as the case may be. The final award would in any such case also take into consideration the payments, if any, made under the interim award. Suffice it to say that the making of the interim award in no way prevents the arbitrator from making adjustments of the amount in the final award and doing complete justice between the parties. By that logic even if we assume that the Prasar Bharti was to fail in substantiating its further claims which are disputed and the appellant were to succeed wholly in the counter claim that it has made, all that it would result in is an award in favour of the appellant. There is, therefore, no inherent illegality or perversity in the making of the interim award by the arbitrator so as to call for interference by this Court under Section 34 of the Act.

9. As regards the question whether the amount of Rs.7.69 Crores was admittedly payable to the respondent, Mr. Jaitley did not make any attempt to assail that finding and in our opinion rightly so. The arbitrator has, on the basis of the pleadings of the parties and the correspondences exchanged between them, clearly arrived at a finding that a sum of Rs.7.69 Crores is outstanding against the appellant on its known admissions. The arbitrator has in that regard observed :

“Having regard to the fact that the amount has been admitted by the Respondent as payable to the Claimant against the amounts payable against the bills for telecast of episodes of various serials, I consider it appropriate to make an interim award in favour of the Claimant directing the Respondent to make a payment of a sum of Rs.7.69 Crores to the Claimant towards discharge of its admitted liability. This interim award will be taken into consideration at the time of making the final award after determination of the amount payable by the Respondent to the Claimant under the Statement of Claim, including the claim regarding interest as well as the amount found payable to the Respondent under the counter claim.

Accordingly I make this Interim Award and direct the Respondent to pay to the Claimant a sum of Rs.7.69 crores (Rupees seven crores sixty nine lakhs only) against the claim

made by the Claimant, which is the subject-matter of these
arbitral proceedings.”

10. In the light of the above findings which have been affirmed even by the learned Single Judge, there is no room for taking a contrary view by us. In the result, this appeal fails and is hereby dismissed but in the circumstances without any order as to costs.

T.S. THAKUR,J

VEENA BIRBAL, J

FEBRUARY 08, 2008
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