

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

Reserved on: 25th May 2019
Pronounced on: 01st July 2019

+ **O.M.P. (COMM) 196/2019 & I.A. 7134/2019**

ONGC PETRO ADDITIONS LIMITED

..... Petitioner

Through: Dr. A.M. Singhvi, Senior Advocate
with Mr. K.R. Sasiprabhu, Mr. Robin
V.S. and Mr. Aditya Swaroop,
Advocates.

versus

TECNIMONT S.P.A. & ANR.

..... Respondents

Through: Mr. Ritin Rai, Senior Advocate with
Mr. Abhipsit Mishra, Mr. Aabhas
Kshetarpal, Mr. SB Arjun and Ms.
Ishita Bist, Advocates.

CORAM: JUSTICE SANJEEV NARULA

JUDGMENT

SANJEEV NARULA, J

1. The Petitioner-OPaL has filed the present petition challenging the interim order dated 10th May 2019 (“**Impugned Order**”) passed by the Arbitral Tribunal in an international commercial arbitration. By virtue of the impugned order, OPaL’s application under Section 19 of the Arbitration and Conciliation Act, 1996 (“**Act**”) for placing additional documents and evidence on record (“**Documents**”) has been rejected by the Arbitral Tribunal.

BRIEF FACTS

2. On 2nd September 2011, Petitioner-OPaL and the Respondents-Tecnimont entered into two separate contracts with respect to construction of Polyethylene (PE) and Polypropylene (PP) units for USD 4.2 billion (“**Contracts**”). Tecnimont issued two notices of arbitration with respect to purported disputes arising from the Contracts. Thereafter, both parties appointed their respective nominee arbitrators. Pursuant to an application by Tecnimont under Section 11 of the Act, the Hon’ble Supreme Court appointed the presiding arbitrator and the Arbitral Tribunal was constituted. On 8th May 2017, the Tribunal passed an order prescribing a procedural timetable whereby the timeline for completion of pleadings, production of documents and oral hearings was fixed. Thereafter, vide subsequent orders, the procedural timetable was amended. Tecnimont filed its Statement of Claims on 6th November, 2017 and OPaL submitted its Statement of Defense and Counter Claim on 2nd April, 2018. Pursuant to a case management conference, procedural order dated 10th April, 2018 was passed and OPaL was directed to produce all documents in support of its Counter Claim by 23rd April, 2018. On 1st October, 2018, Tecnimont filed its reply and Defence to Counter Claim, OPaL submitted its reply to Defence to Counter Claim and thereafter both parties filed their rejoinders. On 11th October 2018, both parties served their Quantum Experts’ Supplementary Reports. Mr. Colin Johnson, Tecnimont’s Quantum Expert incorporated an Appendix 1 in his report wherein he pointed out the lack of substantiation in OPaL’s Quantum Expert’s report. On 24th March 2019, he reiterated the objections. On 19th April 2019, both parties’ Quantum Experts submitted a

joint note wherein Tecnimont's Quantum Expert gave his reasons in support of his objections. On 25th April 2019, OPaL's Quantum Expert sought an extension till 30th April 2019 to submit the joint schedule of Alternative Valuation of Claims. Tecnimont's Quantum Expert wrote to the Tribunal seeking its guidance on the belated documents sought to be produced on record by the OPaL's Quantum Expert. The Arbitral Tribunal addressed an email inter alia stating that "no further evidence was permissible". On 30th April 2019, OPaL filed an application under Section 19 of the Act to produce new documents and a witness statement of Mr. Rajendra Prakash relating to its counterclaim. Tecnimont filed its reply thereto and the rejoinder was filed by OPaL. On 10th May, 2019 the impugned order was passed by the Tribunal, rejecting OPaL's application. The said order reads as under:-

"Dear Colleagues,

The Tribunal has carefully considered the application made by the Respondent under Section 19 of the Arbitration and Conciliation Act, 1996 to place on record an additional witness statement and certain documents (the "additional documents") together with the response served on behalf of the Claimants and the final reply served on behalf of the Respondent.

In the event, the Tribunal has concluded that the application should be rejected and dismissed.

We have reached this conclusion for reasons which we would briefly summarise as follows:

First, the time for producing documents expired some time ago.

Second, the Respondent has not provided any satisfactory explanation as to why these documents were not produced when they ought to have been many months ago. The Respondent has

had ample opportunity to produce documents which they may have wished to rely upon and the Tribunal has already been generous as appropriate in extending the time for so doing. However, the present application comes far too late and as we have said, without any satisfactory explanation for the delay.

Third, it is now less than a month before the commencement of the main hearing. As ordered by the Tribunal, the parties will shortly be serving their opening written submissions and no doubt making appropriate preparations for the hearing. In our view, it is grossly unfair to expect the Claimants -and their experts - to have to deal with this new material at this very late stage. We fully recognise that such unfairness has to be balanced against the potential unfairness to the Respondent that may be caused by the exclusion of this material. We have borne that fully in mind; and the Tribunal has carefully sought to perform that balancing exercise. In the event, we are satisfied that the balance lies strongly in favour of the Claimants and that the introduction of the additional witness statement and the additional documents at this stage will cause the Claimants substantial prejudice which cannot be compensated simply by an order for costs.

Fourth, it would appear that the additional documents do not stand alone. Since the application was first made by the Respondent, its expert, Mr Yogen Vaidya, has served a further Supplementary Report dated 7 May 2019 which seeks to utilise the data contained in the additional documents to support certain entirely new opinions and calculations. The report itself extends to some 22 pages and includes various detailed revised computations apparently based on such data. It is thus plain that the purpose for seeking to introduce the additional documents at this stage is to enable the Respondent to vary or modify its case - or advance an alternative case. In truth, the question whether to allow the Respondent to introduce the additional documents is separate from the question whether Mr Vaidya's Report should be admitted- although the two questions would seem to go hand in hand to some extent at least because the Respondent has indicated that Mr Vaidya expected the Tribunal to take on record

his new report only if we allow the present application of the Respondent. In any event, it seems inevitable that if we were to allow the introduction of the additional documents, this will inevitably require the experts to produce yet further reports which would, in our view, be an intolerable burden at such a late stage when the Claimants and their experts are no doubt under considerable pressure in preparing for the hearing on the basis of the existing material and the case advanced so far on behalf of the Respondent.

ORDER

For all these reasons, we hereby order that the said application is rejected and dismissed. We reserve all questions of costs. Given the concession made by the Respondent, it also follows and we hereby order that the further Supplementary Report of Mr Yogen Vaidya dated 7 May 2019 is to be excluded.”

3. The Court has heard Dr. A.M. Singhvi, learned Senior Counsel for OPaL and Mr. Ritin Rai, learned Senior Counsel for Tecnimont at considerable length. Both the Senior counsels argued the matter on several dates, impressing upon the Court the importance and profile of the matter on the basis of the magnitude of the counter claim of OPaL, which is stated to be Rs. 1000,00,000/-.

4. At the outset, Mr. Rai raised preliminary objection regarding maintainability of the present petition *inter alia* on the ground that the impugned order is not an interim award as defined under the Act. Dr. Singhvi on the other hand contended that the objection of the Respondent is misplaced and the order impugned in the Petition can be challenged under Section 34 of the Act. He submitted that the law on the subject is no longer

res integra and has been authoritatively decided in favour of the Petitioner in several judgements. The Court is of the view that irrespective of the enormity of the amount involved in the arbitration proceeding, before delving into the merits of the case, the Court has to first evaluate and assess if the objection of the Respondent is sustainable. Therefore, before delving into the merits of the case, it is considered appropriate to first deal with the preliminary objection raised by Tecnimont.

Whether the impugned order in its essence and effect is an interim award?

5. One of the core questions pertaining to the maintainability of the Petition is whether the impugned order in its essence and effect amounts to an interim award. Dr. Singhvi argued that the impugned decision is an interim award within the meaning of Section 2 (1) (c) of the Act and is subsumed within the expression "Arbitral Award" and can therefore be challenged under Section 34 of the Act. The main thrust of Dr. Singhvi's submission is that the Order conclusively determines OPaL's valuable right, inasmuch as the Arbitral Tribunal has taken a final view on OPaL's right to file additional documents. The impugned order has denied OPaL of its guaranteed right to due process and resultantly it has been rendered without a remedy to present its case. The right to lead evidence is a "valuable right" and is inherently related to due process and fairness in proceedings. Dr. Singhvi also argued that the question of maintainability should be resolved and interpreted inconsonance with the law laid down by the Supreme Court in the decision of *Shah Babulal Khimji v. Jayaben D. Kania & Anr.*, (1981) 4 SCC 8. Supplementing this argument, Dr. Singhvi referred to a judgement of this

Court in **Cinevistaas Ltd. v. M/s Prasar Bharti** (2019 SCC Online Del 7071) decided on 12th February 2019 in OMP (Comm) 31/2017 and placed reliance on paras 21, 22, 23, 24 and 25 of the said judgement. Dr. Singhvi argued that although strictly speaking, the provisions of Code of Civil Procedure 1908 are not applicable in the arbitration proceedings, yet the Courts can rely upon the same if the situation so warrants. He explained that though the case of **Cinevistaas Ltd. (supra)**, is in the context of arbitration proceedings, yet the Court relied upon the provision of the Code to decide the dispute as to the nature of “finality” of an order. He further argued that in the aforesaid judgment, the Court has analysed what is meant by finality in the context of an interim award and thus the relevant test as laid down therein should be applied in the present case. Dr. Singhvi emphatically relied upon the observations of the Court in para 24 of the Judgement and in particular the expression - *"If a valuable right is lost, it would be an interlocutory judgement. If the order is routine in nature, it would not constitute a "judgement."* and contended that the above words lay down the true and correct test to judge whether a particular order is in essence and effect an “interim award”. He then relied upon the judgment of the Supreme Court in **Indian Farmers Fertilizer Cooperative Limited v. Bhadra Products** (2018) 2 SCC 534 and argued that the Supreme Court while dealing with a similar situation has held that any decision which finally decides an issue is an interim award within the meaning of Section 2(1) (c) of the Act.

6. Dr. Singhvi also candidly acknowledged that there is a contra view of this court in **Rhiti Sports Management Pvt Ltd v. Power Play Sports & Events**

Ltd (2018 SCC OnLine Del 8678) but argued that the aforementioned judgment is distinguishable and is inapplicable. Elaborating on this point, he contended that in the said judgment, there is no discussion or analysis on the test to determine finality of an award of Section 18 of the Act. He further contended that if perhaps the test laid down in Cinvevistaas Ltd. (supra), would have been applied to the facts in Rhiti Sports (supra) this Court would have reached the same conclusion. Dr. Singhvi further argued that in the context of admissibility of documents, the determination of "valuable right" would depend on the nature of the documents; their relevance; the prejudice being caused to the other side on account of belated production; the stage of the proceedings etc. The right to lead evidence is a "valuable right" and is inherently related to due process and fairness in the proceedings. In support of this submission, Dr. Singhvi placed reliance on the judgement of A v. T (2018) SCC Online Del 9395, KM Thamburajan v. Trichy Cafe (2013) SCC Online Mad 1986 and the text of Russell on Arbitration(23rd Edition). Dr. Singhvi further contended that the Arbitral Tribunal has summarily, without affording an oral hearing, dismissed OPaL's application on the misconceived ground of "inconvenience". The impugned order is a final decision which has the effect of extinguishing OPaL's substantive and valuable right to lead evidence and to have documents considered by the Arbitral Tribunal for adjudication of OPaL's Counter Claim and ergo the order has the force of award and hence the petition is maintainable.

7. On the other hand, Mr. Ritin Rai, learned Senior Counsel for Tecnimont argued that impugned order does not decide or consider any of the claims or

counter-claims and is thus demonstratively not an award or an "interim award". He is further argued that the question of evidence did not affect "valuable rights" of the parties as the same was sought to be presented after the cross examination. He also strongly argued that the relevant facts in **Rhiti Sports Management Pvt Ltd** (supra) are identical to the present case . In the said case, the Court dealt with exactly the same question of law that arises herein and urged that issue of maintainability is directly and squarely covered by the afrorenoted decision. Mr. Rai also distinguished the decisions relied on by the OPaL in **IFFCO Ltd.**(supra) and **Cinevistaas Ltd.** (supra). He clarified that in contrast with the position in **IFFCO Ltd** (supra) and **Cinnevistaas Ltd.** (supra), in the present case, none of OPaL's counterclaims have been considered; let alone rejected or otherwise "disposed of" by the Tribunal. The claims and counterclaims will be decided by the Tribunal in the final award. The impugned order is procedural in nature and relates to rejection of a belated application to file additional documents.

8. The Court has given thoughtful consideration to the rival contentions of the parties. There is no dispute that the definition of Arbitral Award includes "Interim Award". The question posed before the Court is whether the order impugned qualifies to be an "Interim Award". On this aspect, since the learned senior counsels for the parties have largely focused and stressed on the case law, it is appropriate to first consider and reflect on the same. In order to ascertain the applicability of **Cinevistaas Ltd.** (supra), it is necessary to note the factual background in the said case. The facts of the said case, as noted and discussed in paras 16 to 22 of the judgement reveal that the order

of the Arbitrator impugned in the said case decided an application of the Claimant seeking to raise additional claims, by way of an amendment of the statement of claims. The application was opposed inter alia on the ground of limitation. The learned Arbitrator referring to the legal position on the question of limitation dismissed the application holding the additional claims to be barred by time. In this context, question arose before this Court relating to the nature of the order and consequentially also on the aspect of maintainability of the petition under Section 34 of the Act. The Court held that the impugned order rejected the additional claims that were being proposed to be raised by way of amendments on the ground of limitation and there is finality attached to the interim order and that there would be nothing in the final award in respect of the said rejected claims. The Court accordingly held that the order is not just an interim award, but a rejection of additional claims finally. In this context, the Court relied upon the judgement of the Supreme Court in **Shah Babulal** (supra) and made the observations in para 24 of the judgement. There are thus several differentiators that render the said judgement inapplicable. This becomes further evident from the observations of the Court in para 25 of the aforesaid judgement which follows para 24. For clarity, both the paragraphs are reproduced herein under:-

“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.

25. A similar distinction, as has been drawn in ***Shah Babulal Khimji (supra)*** between an ‘order’ and a ‘judgment’, would have to be drawn even in arbitration proceedings while construing the term ‘award’ or ‘interim award’. While technical, procedural and other amendments, which may be allowed or rejected, can be challenged along with the final award, the rejection of a substantive claim cannot be held to be non-challengeable.”

(emphasis supplied)

9. The above observations show that the factual situation was entirely different. The Court also held that the application of the Petitioner was wrongly titled as application for correction of typographical errors and after analysing the nature of the order, it was held that the same constituted as an interim award. Thus, on a careful analysis of the aforesaid judgement, it clearly emerges that the same is distinguishable on facts and is entirely inapplicable to the facts of the present case. The Court is not impressed with the argument of Dr. Singhvi that the observations of the Court in the said case should be construed to be applicable to any situation, wherever a valuable right is decided.

10. The reliance on the decision in ***Indian Farmers Fertilizer Cooperative Ltd.*** (supra) is also misplaced. The distinguishing facts in the said

judgement, are discernible from the following paras:

“7. The point at issue is a narrow one: whether an award on the issue of limitation can first be said to be an interim award and, second, as to whether a decision on a point of limitation would go to jurisdiction and, therefore, be covered by Section 16 of the Act.

8. As can be seen from Section 2(c) and Section 31(6), except for stating that an arbitral award includes an interim award, the Act is silent and does not define what an interim award is. We are, therefore, left with Section 31(6) which delineates the scope of interim arbitral awards and states that the arbitral tribunal may make an interim arbitral award on any matter with respect to which it may make a final arbitral award.

9. 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.

13. In *Exmar BV v National Iranian Tanker Co.* [1992] 1 Lloyd's Rep. 169, an interim final award was made, which contained the decision that it would not issue any such award in the claimant's favour pending determination of the respondent's counter claims. Detailed reasons were given for this decision. The Judge, therefore, characterized the aforesaid award as an award finally deciding a particular issue between the parties, and concluded that as a result thereof, he had jurisdiction to review the tribunal's decision.

16. Tested in the light of the statutory provisions and the case law cited above, it is clear that as the learned Arbitrator has disposed of one matter between the parties i.e. the issue of limitation finally, the award dated 23rd July, 2015 is an "interim award" within the meaning of Section 2(1)(c) of the Act and being subsumed within the expression "arbitral award" could, therefore, have been challenged Under Section 34 of the Act."

(emphasis supplied)

11. As can be seen from the above, the question before the Court in the said case was again relating to limitation and was decided in a very different context. While deciding the said question, the Supreme Court analysed several judgements on this subject and has held that an "interim award" or "partial award" is a "final award" in the matters covered therein made at an intermediate stage of the arbitration proceedings. The decision of the arbitral tribunal on the question of limitation was held to be determinative and final on the issue. In these circumstances, the order was held to be an "interim award" within the meaning of Section 2 (1) (c) of the Act. The said judgement therefore has no application on the issue in hand. It is also relevant to note that in *IFFCO* (supra), the Supreme Court recommended that the Parliament should amend Section 34 so as to consolidate all interim

awards together with the final arbitral award so that one challenge under Section 34 can be made after delivery of the final arbitral award. Piecemeal challenges like piecemeal awards lead to unnecessary delay and additional expense.

12. Coming next to the judgment of this Court in **Rhiti Sports Management Ltd.** (supra). This case, as rightly contended by Mr. Rai is squarely applicable to the facts of the present case. In the said case, the Court decided the challenge to an order of the Arbitral Tribunal deciding an application for placing additional documents. The Court elaborately discussed the scheme of the Act and in particular Sections 31(6) and 32 of the Act and also authoritative text on the subject - **Russell on arbitration** (23rd edition) and **Mustill and Boyd on Commercial Arbitration** (Second Edition) and held that the order impugned was not an interim award. The distinction sought to be drawn by OPaL regarding the applicability of the said decision is wholly misplaced. The relevant portion of the said judgement 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.

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"

25. In the present case, the impugned order relates to rejection of the petitioner's application to file additional documents. Clearly, this is a procedural matter and does not decide any issue for adjudicating the dispute between the parties. Thus, the contention that the same would qualify as an interim award is wholly unmerited."

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.

Whether the impugned order is amenable to challenge under section 34 of the Act?

14. Since the impugned order is not an interim award, there cannot possibly be any ground to challenge the same under Section 34 of the Act. Thus, the Court is not really required to go into the merits of the impugned order. However, since elaborate arguments have been addressed by both the parties on this issue, for the sake of completeness of things, it is considered appropriate to give a finding on the same.

15. Dr. Singhvi has advanced plethora of arguments on the question of maintainability and the jurisdiction of the Court under Section 34 of the Act. The law governing the Contract between the parties are the laws of India and the arbitration proceedings are being conducted in accordance with the Act read with UNICITRAL Rules. Since the arbitration is seated in India, this Court being the Supervisory Court having jurisdiction over the conduct of Arbitration has been called upon to interfere with the decision of the Arbitral Tribunal, impugned in the present petition. The Tribunal's rights and powers to deal with the question of admissibility of documents is governed under Section 19 of the Act which reads as under:-

“19. Determination of rules of procedure.— (1) The arbitral tribunal shall not be bound by the Code of Civil Procedure, 1908 (5 of 1908) or the Indian Evidence Act, 1872 (1 of 1872).

(2) Subject to this Part, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting its proceedings.

(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.

(4) The power of the arbitral tribunal under sub-section (3) includes the power to determine the admissibility, relevance, materiality and weight of any evidence.”

16. A bare reading of the aforesaid provision shows that the Arbitral Tribunal, subject to the agreement between the parties on the procedure to be followed by the Tribunal in conducting its proceedings, is free to determine the course and the manner it considers appropriate to conduct the proceedings. Section 19(4) of the Act stipulates that the Tribunal also has the power to determine the admissibility, relevance, materiality and weight of any evidence. It is in this context that OPaL has invoked the jurisdiction of the Tribunal seeking its permission to place additional documents on record. Such matters are purely in the domain of the Arbitral Tribunal. Though the Supervisory Court would have the jurisdiction to interfere with the decisions of the Arbitral Tribunal, however, the scope of such judicial intervention is circumspect and has to be within the well-defined contours. The recourse to a Court under Section 34 of the Act can only be against an Arbitral Award. Dr. Singhvi argued that the additional documents ought to have been considered and taken on record as none of the documents alter the claim or the cause of action of Tecnimont. It is further urged that there is no delay in submitting the documents. The additional documents sought to be

produced were not readily available with Petitioner during the preparation of the SODC and the EY Report on account of an on-going implementation of SAP systems and non-closure of books of accounts for the financial year ending as on 31st March, 2018. Therefore, certain assumptions were to be made by the Experts based on the projections and information provided by OPaL. The documents are now available and were sought to be produced without any delay when on 19th April 2019 Tecnimont's Expert in the joint note raised objections with regard to certain counterclaims. It was further argued that even though earlier Tecnimont's Expert had raised some concerns at the procedural hearing held on 24th March, 2019, the Respondent had not stated the exact nature of the lack of substantiation till 19th April 2019.

17. Dr. Singhvi has also laid stress on the argument that the impugned award is contrary to the fundamental policy of Indian law and that the arbitral tribunal must determine the rights and obligation of the parties in accordance with the principles of natural justice. The impugned award is contrary to the principles of natural justice and denies opportunity to OPaL to fully present his case. The Arbitral Tribunal failed to appreciate that in accordance with the fundamental principles of justice and fair play, no prejudice would be caused to Tecnimont. The impugned order without examining the nature of the documents wrongly held that the purpose of the application is to enable the Petitioner to "vary or modify its case- or advance an alternative case". Further, given the complexity of the matter, the Arbitral Tribunal ought not to have summarily dismissed the application without affording an oral hearing. It was urged that in the event the Court finds that there are grave

natural justice and fairness concerns, before setting aside the award, the Court may also remit the matter back to the Arbitral Tribunal. It was then argued that under Section 34(4) of the Act, the Court can remit the award to the Tribunal to give an opportunity to “resume the arbitral proceedings” or “to take such other action” to eliminate the grounds for setting aside the award. Buttressing this contention, Dr. Singhvi relied on Kinnari Mullick v. Ghanshyam Das Damani (2018) 11 SCC 328 and contended that the scheme of the Act is that the Court should intervene to prevent what may finally become an unsustainable award.

18. Mr. Ritin Rai, on the other hand, argued that assuming that this Court is satisfied that the impugned order dated 10th May 2019 is an interim award, the limited grounds of challenge under Section 34 of the Act do not permit for the substitution of the decision of an Arbitral Tribunal, particularly on matters of procedures. During arguments, Mr. Ritin Rai read out the transcripts of the proceedings to demonstrate that it is also OPaL’s understanding that such matters are entirely in the hands of the Tribunal and do not call for interference of this Court. Further, Section 19 makes it clear that an Arbitral Tribunal shall not be bound by the Code of Civil Procedure, 1908 or the Evidence Act, 1872 and that it may conduct the proceedings in the manner it considers appropriate. It was further urged that OPaL was given a full right to present its case and that there is neither any violation of Section 18 nor any ground under Section 34(2)(iii) made out. Mr. Ritin Rai strongly refuted the argument of the Petitioner that the application under Section 19 could have been filed only pursuant to the joint note dated 19th April, 2019 and therefore there was no delay on its part. In that context, it

was argued that OPaL has now belatedly sought to advance an entirely new case before this Court. Mr. Ritin Rai also argued that, on a reading of the Section 19 application, it is demonstrated that the Petitioner has provided no reason for not producing the documents prior to 30th April, 2019. Given that the application is bereft of reason, Petitioner cannot fault the procedural order of the Tribunal rejecting the said Section 19 Application. OPaL was required to file all documents in support of its counter claim as early as February 2018 and had various opportunities even thereafter, including in October 2018 and December 2018; and OPaL chose not to avail those opportunities. A reading of the transcripts of the hearing held on 10th April 2018 and 24th March 2019 demonstrates that OPaL never had the intention of filing any additional documents to substantiate its counter claim. Therefore, there is no infirmity with the reasoned procedural order passed by the Tribunal and the present petition has infact been filed solely with the intention to ambush the arbitral proceedings. Mr. Rai also distinguished the judgment of **Kinnari Mullick** (supra) and argued that the scheme of the Act is such that the Courts shall not intervene except where the provisions expressly provide.

19. The Court has given its anxious consideration to the contentions of the parties on this issue. Section 34 of the Act delineates the scope of challenge. It has been restricted and narrowed down considerably by the Amendment Act of 2015. Before the Court goes into this well defined area that has been settled by numerous judicial precedents, let us first examine the impugned order. Is it so perverse that it would shock the conscience of the Court? A perusal of the order shows that the Tribunal has in fact applied its mind to

OPaL's application, Tecnimont's reply thereto and also OPaL's rejoinder. After due consideration, the Tribunal has held that OPaL has not provided any satisfactory explanation as to why the documents were not produced when they ought to have been done many months ago. The Tribunal also observed that OPaL had ample opportunity to produce the documents and that the Tribunal has been generous in extending the time for doing so. OPaL argues that the nature and complexity of the arbitration proceeding required a more reasonable approach by the Arbitral Tribunal. In order to test the contentions and assertions, of the Petitioner, it is necessary to look into the explanation and the reasons disclosed in the application that has been decided by the impugned order. A perusal of the application reveals that OPaL has offered no ground or reason for not producing the documents at a date prior to 30th April, 2019. The only relevant averments which gives a plausible explanation on the question of delay in filing the documents is noted below:

“26. There is no delay or latches on the part of OPaL in producing these documents. It is submitted that most of these documents were not readily available with OPaL during the preparation of the EY Report on account of on-going implementation of SAP systems and non-closure of books of accounts for the financial year ending as on 31 March 2018 (i.e. post the date of the Report). Thus, certain assumptions were to be made by the Experts based on the projections and information and/or explanations provided by OPaL. However, the documents marked as Exhibits R-335 to R-353 are now available with OPaL to substantiate the assumptions made by the Experts in relation to Joss of profits from the PE Unit and Joss of profits from the DFCU and hence OPaL craves the kind indulgence of the Hon'ble Tribunal to accept these documents on record in the interest of justice.”

20. The detailed description given by the Petitioner in its written submissions, rejoinder submissions and sur-rejoinder submissions do not find mention in the applications and are being made for the first time in an attempt to persuade the Court to overlook the actual reality. There is improvisation of the stand as originally taken by OPaL in its application. The variation in the stand casts suspicion on the genuineness of the reasons for delay. The requisite details cannot be supplemented at this stage and this objection cannot be overcome by invoking the relevant tests for allowing the application viz. nature of evidence; extent of evidence. The procedural impugned order of the Tribunal cannot be scrutinized on the basis of the grounds and reasons not cited before the Tribunal. OPaL is assailing the impugned order on the ground of perversity, based on material that was not existing before the Tribunal. This is impermissible. Dr. Singhvi has argued that the only ground for dismissing the application is of "inconvenience". This plea is also devoid of merit. The order is thus well reasoned and reflects that the Tribunal has considered and analyzed all the aspects. The Tribunal has noted that there is no explanation for the inordinate delay in filing of the application and for filing the documents. It also notes that it would be unfair to expect Tecnimont and its experts to deal with the new material. Allowing the production of the documents would cause substantial prejudice to Tecnimont which cannot be substantiated by an order of cost and the expert report will *"inevitably require for the experts to produce yet further report, which would be, in our view by an intolerable burden"*. The impugned order rejects the documents not only on the ground of inordinate delay but also for lack of explanation of relevance and authenticity. The reasons for rejection of the application are well founded and are based on the averments made in

the application and not just for “inconvenience” as alleged by Dr. Singhvi. There is no infirmity or illegality in the order. Dr. Singhvi has relied upon Section 18 read with Section 34(2)(iii) of the Act and argued that both the parties are entitled to equal opportunities to present the case. The Tribunal in its order stated that it has been "generous as appropriate" which shows that the Tribunal has acted reasonably. The Tribunal has the jurisdiction under section 19(4) of the Act to determine the admissibility of the documents and having regard to the averments made in the application, the Court does not see any infirmity in the impugned order. The Court cannot substitute its views with those of the Arbitral Tribunal. The fundamental policy of Indian Law does not envisage a review on the merits of the case. It is settled law that Section 34 specifically provides that a challenge to an arbitral award on the ground that it is in contravention with the fundamental policy of Indian law does not entail a review on the merits of the dispute. There is thus no ground for interference under any of the provisions of Section 34 of the Act.

21. Dr. Singhvi has also laid considerable emphasis on the question of relevance and authenticity of the documents. Dr. Singhvi has assembled a battery of tests such as relevancy, authenticity, stage of filing etc. that he suggests can be used to sift and sieve the cases, so that only deserving cases come through. He argued that applying these parameters rigidly, the Court can effectively filter the flow of cases. To my mind these tools may not guarantee restrictive inflow. It would infact open a flood gate. Aggrieved party posing that a right has been lost, would meander in and the Courts would then be engaged in finding out whether the test has been cleared or bypassed. The facts have to be interpreted in a constructive way. OPaL is

faced with a rejection because it never realised the importance of timelines. It filed the claim in a nonchalant manner, without supporting proof of the claims. When the experts confronted it with this inadequacy of sustainable corroborating evidence, it started hurriedly looking for documentary evidence. It fazes me that documents purportedly claimed to be vital were not filed, despite becoming aware of the lacuna. Be that as it may, when OPaL got alerted about the shortcomings, it should have moved with alacrity. Now it is veering out of the objection of delay by asserting the eminence of the documents and blaming the Arbitral Tribunal for being inflexible and unreasonable for fixing an unrealistic time schedule. Arguments advanced before the Court giving explanation for the delay are riddled with conflict. Undisputedly, the delay is not on account of any unforeseeable circumstances, but is rather on account of factors that makes OPaL blameworthy. If the accounting systems were not functioning and data could not be fed for generating the revised realistic results, the Arbitral Tribunal cannot be faulted. Thus, the facts of the case lead to an inevitable conclusion that OPaL has miserably delayed the filing of the document for reasons attributable to no one but OPaL. At this stage it cannot overcome this fundamental mistake by alluding to plea of loss of valuable right. Thus the upshot of the above discussion is that OPaL is a victim of its own follies. OPaL has not acted swiftly and has exhibited casual attitude that the Court cannot countenance. Therefore, there is no ground to interfere under section 34 of the Act, even if the Court were to assume for the sake of arguments that the order qualifies the test of an 'interim award'.

22. Before parting the Court would also like to express its views on OPaL's

contention relating to applicability of the judgment of *Kinaari Mullick* (supra). The said judgment deals with the power of the Court under Section 34 (4) of the Act. The said provision reads as under:

“34. Application for setting aside arbitral award.—

(4) On receipt of an application under sub-section (1), the Court may, where it is appropriate and it is so requested by a party, adjourn the proceedings for a period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the opinion of arbitral tribunal will eliminate the grounds for setting aside the arbitral award.”

23. A reading of the aforesaid provision shows that it deals with a situation that where on a receipt of an application under section 34(1) of the Act if the Court is requested by a party, the Court in appropriate cases can adjourn the proceedings in order to give the Arbitral Tribunal an opportunity to resume the proceedings or take such other action as in the opinion of the Arbitral Tribunal to eliminate the ground for setting aside the arbitral award. Clearly, this provision could be invoked by a party which is not seeking to have the order set aside. OPaL, therefore cannot rely upon the said provision. Though the word used in the provision is "requested by a party", however in the context of the present case, undoubtedly the elimination of the grounds for setting aside of the arbitral award would not be at the instance of a party challenging the award. This provision would ordinarily be invoked by the opposite party who would like to take recourse to the same for eliminating such grounds that can lead to setting aside of the

award. **Kinaari Mullick** (supra) is also relied upon to contend that the intent of the Act is that the Court should intervene to prevent what may finally become an unsustainable award. This argument is wholly misconceived. If such a view is taken in the present case, it would amount to holding that the view expressed by the Tribunal in the impugned order would render an award unsustainable without its adjudication. Moreover, the provisions of the Act expressly bar a Court from intervening except where expressly provided. Section 12, 13 and 16 of the Act clearly mandate that the remedy of the party is to challenge the final award and not at an intermediate stage. OPaL's interpretation of Section 34 (4) is contrary to the scheme of the Act and is impermissible. The Act does not mandate that a party be coerced or cajoled into presenting its case; the Act only mandates that a party be given an opportunity to present its case, however the same has not been done by OPaL at the relevant stage.

24. In view of the above discussion, the Court finds no merit in the petition and the same is dismissed along with the pending application. Parties are left to bear their own costs. Needless to say that the views expressed hereinabove shall not have any bearing on the merits of the claims or counter-claims.

SANJEEV NARULA, J

July 01, 2019

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