



## **BACKGROUND**

Cinevistaas Ltd (“**Cinevistaas**”) and Prasar Bharti (“**Prasar**”) executed commercial terms (“**Agreement**”) for the production and telecast of a game show on television. Disputes arose between the parties as three weeks prior to the telecast, Prasar Bharti informed Cinevistaas that it would not telecast the show.

During the arbitration proceeding, Cinevistaas filed an application dated 25 May 2008 (“**Application**”) seeking the leave of the Tribunal to amend its Statement of Claim dated 31 August 2004 (“**Statement of Claim**”). Cinevistaas sought leave to introduce two claims which were inadvertently missed out in the Statement of Claim but were provided for in the Notice of Arbitration dated 31 October 2003 (“**Notice of Arbitration**”) and in the application under section 11 of the Arbitration and Conciliation Act, 1996 (“**the Act**”) for the appointment of an arbitrator (“**Section 11 Application**”).

The Tribunal rejected the Application by an Order dated 8 August 2009 (“**Order**”) and held that the claims in the Application were fresh ‘additional claims’ and were hit by limitation under the Limitation Act, 1963 (“**Limitation Act**”).

Aggrieved by the Order, Cinevistaas filed an application under section 34 of the Act (“**Section 34 Application**”) before the Delhi High Court (“**Court**”) to set aside the Order. The issues which arose for consideration before the Delhi High Court were (i) whether the Application ought to be allowed by the Tribunal; and (ii) whether the Order constituted an ‘*interim award*’ under section 2(1) (c) of the Act and was therefore amenable to challenge under section 34 of the Act.

## **FINDINGS OF THE COURT**

***The claims sought to be introduced through the Application were to cure an error and the claims are not barred by limitation***

1. Upon examining the substance of the Application, the Court concluded that the claims sought to be amended through the Application were already provided for in the Notice of Arbitration and the Section 11 Application, and therefore the finding of the Tribunal that the claims constituted fresh additional claims was incorrect.
2. Referring to section 43 of the Limitation Act and section 21 of the Act, which governs the limitation period applicable to arbitration, the Court noted that the limitation period stops running upon the commencement of arbitration proceedings and the notice of arbitration marks the commencement of the arbitration proceedings. Accordingly, since the additional claims were raised in the Notice of Arbitration itself, the limitation period against the claims ceased to run from the date on which the Notice of Arbitration was received by Prasar, and therefore, claims in the Application were not time barred by limitation.
3. The Court concluded that the Application was not bogus and the veracity of the claims would have to be tested in the arbitration proceedings rather than at the stage of determining the Application.

**MAINTAINABILITY OF THE SECTION 34 APPLICATION:*****Element of finality in the Order***

4. The Court relied upon the findings of the Supreme Court in *Shah Babulal Khimji*<sup>2</sup>, wherein the Supreme Court had drawn a distinction between a “judgment” and an “order”. In the said case, the Supreme Court noted that (i) every intermediary or interlocutory judgment cannot be regarded as a judgment and only those orders which decide “valuable right of the parties” would qualify as a judgment; (ii) for interlocutory orders to constitute a judgment they must contain traits and “trappings of finality”; and (iv) routine orders passed by the court would not constitute a judgment.
5. Importing the distinction drawn between an “order” and “judgment” in *Shah Babulal Khimji*<sup>3</sup>, the Court held a similar distinction would have to be drawn while construing the terms “interim award” and an “award” in arbitrations. The Court thus held that while technical amendments can be challenged along with the final award, the rejection of a substantive claim is challengeable.
6. The Court assessed the nature of the Order and concluded that the Order had a finality attached to it as - (i) the Order rejected the proposed amendments in the Application by holding that the claims are barred by limitation; (ii) the Order is not a procedural order or an order rejecting a technical amendment, but in fact rejects substantive claims; and (iii) the Order is a final adjudication vis-à-vis the Application and there will be no further finding with in this regard in the final award.

***The Order is an ‘interim award’ under the Act and amenable to challenge in the Section 34 Application***

7. Relying upon *Indian Farmers Fertilizer*<sup>4</sup>, the Court concurred that if an issue is determined prior to the final award, such order qualifies as an “interim award” and in the present case the Order qualified as an interim award as nothing further was left for adjudication in the Application. The Court concluded that the Order has a finality attached to it, therefore the Order qualifies as an award and in turn the petition under section 34 of the Act stood maintainable.
8. The Court referred to its ruling in *Container Corporation*<sup>5</sup>, wherein the Delhi High Court held that an order of the tribunal rejecting an application for amendment to the written statement (to incorporate the counter claim) did not constitute an interim award. Distinguishing the ruling, the Court held that seemingly the fact that the application for amendment was moved at a belated stage weighed in on the court therein.
9. The Court also distinguished the decision of the Bombay High Court in *Punj. Lloyd Limited*<sup>6</sup>, wherein the Bombay High Court held that an order of the tribunal refusing to allow amendment to the claim did not constitute an interim award or a final award and such order was not amenable to appeal under section 34 of the Act. The Court noted that in *Punj. Lloyd Limited*<sup>7</sup>, the Bombay High Court ruled out the applicability of *Shah Babulal Khimji*<sup>8</sup> to arbitration proceedings and held that “*Shah Babulal Khimji* ..relating to clause 15 of the Letters Patent, cannot be extended to the proceedings filed under section 34 or any other proceedings permissible under the provisions of the Arbitration”

<sup>2</sup> *Shah Babulal Khimji v. Jayaben D. Kania*, (1981) 4 SCC 8

<sup>3</sup> *Shah Babulal Khimji v. Jayaben D. Kania*, (1981) 4 SCC 8

<sup>4</sup> *Indian Farmers Fertilizer Co-Operative Limited v. Bhadra Products*, 2018 (1) Arb. LR 271 (SC)

<sup>5</sup> *Container Corporation of India v. Taxmaco Ltd.*, 2009 SCC OnLine Del 1594

<sup>6</sup> *Punj. Lloyd Limited and Anr. v. Oil and Natural Gas Corporation Ltd*, 2016 SCC OnLine Bom 3749

<sup>7</sup> *Punj. Lloyd Limited and Anr. v. Oil and Natural Gas Corporation Ltd*, 2016 SCC OnLine Bom 3749

<sup>8</sup> *Shah Babulal Khimji v. Jayaben D. Kania*, (1981) 4 SCC 8

*Act, in view of provisions of section 5 of the Act. Arbitration and conciliation Act, 1996 is a self contained code.”*

10. Diverging from the view of the Bombay High Court in *Punj. Lloyd Limited*<sup>9</sup>, the Court held that the principles of *Shah Babulal Khimji*<sup>10</sup> would apply to arbitration proceedings as the judgment lays down that the substantive rights ought to be considered while determining orders which can be challenged.
11. Based on the above findings, the Delhi High Court held that the Order would fall within the ambit of an “interim award” under section 2(1) (c) of the Act and therefore would qualify as an “arbitral award” which in turn is amenable to challenge under the Section 34 Application.
12. In view of the foregoing, the Court set aside the Order, held that the Section 34 Application was maintainable, and directed the Tribunal to take the amended claim petition on record. The Court remitted the matter to the Tribunal with a guideline to dispose the arbitration proceedings within 12 months from the date of first appearance before the Tribunal.

## **CONCLUSION**

In its effort to determine whether the Order constituted an “interim award”, the court distinguished *Punj. Lloyd Limited*<sup>11</sup> and *Container Corporation*. It may be relevant to note that in both, *Punj. Lloyd Limited*<sup>12</sup> and *Container Corporation*<sup>13</sup> - while determining whether an order of the tribunal refusing to allow amendment to the claim/written statement constituted an interim award and whether such order was amenable to appeal under section 34 of the Act, the Bombay High Court and Delhi High Court respectively concluded that the party aggrieved by the final award will be at liberty to file an application to set aside the award and take all the grounds of challenge as available in law including on the decision rendered by the tribunal rejecting the application for amendment. Accordingly, the applications filed under section 34 were dismissed for want of maintainability.

While the court examined the presence of an element of finality in the Order and determined that the Order could be construed as an Interim Award by applying the principles laid down in *Shah Babulal Khimji*<sup>14</sup>, the Court did not import the finding of the Supreme Court in *Indian Farmers Fertilizer*<sup>15</sup> wherein the Supreme Court had conclusively held that an award on the issue of limitation is an interim award, which being an arbitral award, could be challenged separately and independently under Section 34 of the Act. Therefore, once the Court concluded that the Order was founded on the issue of limitation, it may have applied the ratio in *Indian Farmers Fertilizer*<sup>16</sup> to construe such order as an “interim award”.

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<sup>9</sup> *Punj. Lloyd Limited and Anr. v. Oil and Natural Gas Corporation Ltd*, 2016 SCC OnLine Bom 3749

<sup>10</sup> *Shah Babulal Khimji v. Jayaben D. Kania*, (1981) 4 SCC 8

<sup>11</sup> *Punj. Lloyd Limited and Anr. v. Oil and Natural Gas Corporation Ltd*, 2016 SCC OnLine Bom 3749

<sup>12</sup> *Punj. Lloyd Limited and Anr. v. Oil and Natural Gas Corporation Ltd*, 2016 SCC OnLine Bom 3749

<sup>13</sup> *Container Corporation of India v. Taxmaco Ltd.*, 2009 SCC OnLine Del 1594

<sup>14</sup> *Shah Babulal Khimji v. Jayaben D. Kania*, (1981) 4 SCC 8

<sup>15</sup> *Indian Farmers Fertilizer Co-Operative Limited v. Bhadra Products*, 2018 (1) Arb. LR 271 (SC)

<sup>16</sup> *Indian Farmers Fertilizer Co-Operative Limited v. Bhadra Products*, 2018 (1) Arb. LR 271 (SC)