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DIFFERENCE BETWEEN AN INTERIM ORDER AND INTERIM AWARD UNDER THE ARBITRATION AND CONCILIATION ACT, 1996

Introduction

- 1 Under the Arbitration and Conciliation Act, 1996 (for short “the said Act”), the arbitral tribunal has been empowered to pass an interim order under section 17 and an interim Award under section 31(6).
- 2 The question as to under what circumstances an interim Award may be passed came up before the High Court of Jammu and Kashmir and Ladakh in *Union of India vs. Gee Kay Engineering Industries* (2021 SCC OnLine J&K 678).

Background

- 1 The case relates to non-payment of bills by the applicant (UoI) to the respondent (Gee Kay) on account of supply of certain defence equipment to the Indian Army.
- 2 The dispute was raised before the Sole Arbitrator and an interim Award was passed directing payment of a part of the claim by the applicant to the respondent to ensure that in the meantime, i.e., before the conclusion of the arbitral proceedings, the respondent does not become bankrupt.
- 3 The Sole Arbitrator held that the fate of the arbitral proceedings could not be decided at the initial stage, however, it was prima facie established that the claimant was entitled to an interim Award.
- 4 The applicant challenged such interim Award before the High Court. The Court examined on what circumstances the impugned interim Award was passed and whether it stood on the parameters required for passing such an Award. In doing so, the Court also observed the difference between an interim order and interim award

Interim Order vs. Interim Award

- 1 Section 17 of the said Act lists the nature of interim measures that may be ordered by the arbitral tribunal on application by either parties.
- 2 Under section 17(1)(ii), it has been clarified that such interim measures may be for the protection of interests of the parties during the pendency of the proceedings,

for interim injunction, or such other measures as may appear just and convenient to the tribunal.

3. Under section 31(6), the tribunal may make an interim arbitral Award on ‘any matter’ which it is empowered to decide on in the final arbitral Award.
4. One express difference that arises between the two provisions is that section 31(6) does not contemplate an application being made by the parties for an interim Award.
5. The Court in *UoI vs. GeeKay* observed that an interim Award could not be equated with an interim order as the parameters required to be tested for the two are distinct.
6. An interim order under section 17(1)(ii)(e) is to be made at any point when existence of a *prime facie* case has been established and the balance of convenience lies in favour of granting such order. However, an interim Award may only be made when there is an admission or acknowledgment of a liability.
7. Although *UoI vs. Gee Kay* only speaks of requirement of admission but there may be other factors on which an Award may be passed at an interim stage.
8. An interim Award envisages the colour of an Award *per se* in the sense that it is made on a matter in respect of which a final Award could have been made and thus that aspect of dispute comes to rest by reason of it being decided in the interim Arbitral award.

Decisions of the courts

1. In *IFFCO Ltd. vs. Bhadra Products* (2018) 2 SCC 534, the Supreme Court interpreted the words “any matter” as used under section 31(6) and held that any matter would include all disputes that the arbitral tribunal has to answer. The Court clarified that that an interim Award need not be subject to the final Award, it may in fact be a final Award as against the matters covered thereby but at an interim stage.
2. Similar principle was also observed in the case of



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McDermott International Inc. v. Burn Standard Co. Ltd. (2006) 11 SCC 181.

3. The Bombay High Court has also held in the case of *Sphere International vs. Ecopack India Paper Cup Pvt. Ltd. (2020) 1 R.A.J. 90*, that a final Award may only be made when there is a clear, unambiguous and definite admission or acknowledgement as to the liability and no evidence may be required to prove such admission at the stage of trial.
4. In *UoI vs. Gee Kay*, the Court, relying on these decisions, held that in the impugned interim Award, the Sole Arbitrator committed a patent illegality by allowing part payment of the claims without there being any admission as to the liability on the part of the applicant. The application for grant of interim Award was thus remanded back to the Arbitrator to be considered on merits. The interim Award was set aside on the following grounds:
 - The Arbitrator could not have passed such an Award merely because the respondent was under a burden of financial distress.
 - The Arbitrator applied the parameters of an interim order under section 17(1)(ii)(e) although it was deciding an application under section 31(6) which is an error in itself.
5. In *M.S. Commercial vs. Calicut Engineering Works Limited (2004) 10 SCC 656* and *Union of India vs. 1998 SCC OnLine Del 581*, the Courts have held that an order passed by an arbitral tribunal under section 16, determining the jurisdiction of the tribunal could not be termed as an interim Award and hence would not be subject to challenge under section 34 for setting aside of the Award.

Conclusion

- 1 The various decisions of the Courts on the subject of interim Award make it sufficiently clear that the tribunal is within its powers to pass an interim Award, however such Award may only be made in respect of matters that are due to be answered by the arbitrator in the final adjudication of disputes. Any matter that could be decided in a final Award may also be decided at an interim stage in the form of an interim Award.
- 2 Further, an interim Award may be subject to challenge before the court under section 34, however, an interim order may not be challenged before the court unless a final Award has been passed and brought to challenge, at which stage the parties may raise the issue of the interim order.
- 3 Thus, in view of *UoI vs. Gee Kay* it may be said that an arbitral tribunal must be cautious in passing an interim Award by testing the parameters to be applied and similarly, when passing an interim order, the tribunal must not give it the shape of an Award.
- 4 The underlying purpose of an interim Award is to ensure that a party does not have to wait for the conclusion of the proceedings to realize its dues in relation to the dispute that has been admitted or decided already (*Numero Uno International Ltd. vs. Prasar Bharti, 2008 SCC OnLine Del 175*).