CASE NO.:
Appeal (civil) 1953 of 2006

PETITIONER:
NATIONAL THERMAL POWER CORPORATION LTD.

RESPONDENT:
SIEMENS ATKEINGESELLSCHAFT

DATE OF JUDGMENT: 28/02/2007

BENCH:
A.K. MATHUR & P.K. BALASUBRAMANYAN

JUDGMENT:
JUDGMENT

A.K. MATHUR, J.

1. This appeal is directed against the order passed by the Delhi High Court dated 24-5-2005 challenging the partial award given by the International Chamber of Commerce, Arbitration Tribunal on 31-7-2002.

2. Brief facts which are necessary for disposal of this appeal are that on 6-12-1999 the parties entered into a contract for setting up of 817 MW Gas Based Combined Cycle Power Project at Dadri, U.P. at a price of DEM 324,405,000 equivalent to Rs.2,190,000,000/- (Rupees two thousand one hundred ninety million). At the request of the respondent- Siemens Atkeingesellschaft (hereinafter to be referred to as "SAG") three separate contracts were entered into with cross-fall breach clause. One contract was with respondent -SAG known as "First Contract" and the other with its associates, namely Bharat Heavy Electricals Limited (BHEL), New Delhi and the third with Siemens Limited, Bombay. Considerable delay occurred in execution of the contract which was mostly attributable to the appellant-National Thermal Power Corporation (hereinafter to be referred to as "NTPC"), due to delay in opening of Letters of Credit in favour of the respondent-SAG and in obtaining import licences for various equipments from Statutory Authorities. Respondent raised several claims against the appellant-NTPC for losses resulting from delay. On the other hand, the appellant was also facing acute difficulty in getting the critical components and spare parts and tools from the respondent. In order to sort out the said disputes, a high-powered meeting of the parties was held on 6th/7th April, 2002 in which several decisions were taken. One of the decisions taken in the meeting was that the respondent was to supply the critical components and spare parts etc. to the appellant-NTPC on its part and on the other hand the appellant-NTPC agreed to look into the claim raised by the respondent-SAG with more positive approach in view of the fact that there was delay in arranging import licences and opening of Letter of Credit by the appellant-NTPC. In pursuance to the decision, the respondent-SAG supplied the critical components etc. but the appellant-NTPC did not favourably consider the claim of the respondent-SAG for damages on account of the aforesaid delay. Subsequently, the respondent-SAG made a reference to ICC Court of Arbitration, Paris for settlement of their disputes/claim to compensation on account of delay in terms of Clause 27 of the Contract. The ICC International Court of Arbitration registered the reference as Case No. 11728/ACS and on 5th May, 2002 issued terms of reference. The ICC International Court of Arbitration was comprised of three Arbitrators, namely Mr. Arthur Marriott QC, Chairman and Mr. Justice R.S. Pathak and Mr. Justice A.M. Ahmadi, two former Chief Justices of the Supreme Court of India. While the claim of the respondent-SAG related largely to compensation on account of delay on the part of the appellant-NTPC in procuring the import licences and belated opening of the Letter of Credit in favour of the respondent, the appellant-NTPC besides filing their defence to the said claims also filed several counter claims on various

counts amounting to hundreds of crores of rupees against the respondent-SAG. The respondent-SAG resisted the said counter claims of the appellant-NTPC inter alia on the grounds that the counter claims were not arbitrable because the claims had been waived and/or abandoned and/or discharged and/or satisfied or compromised and the appellant had failed to fulfil the condition precedent to arbitration specified in Clauses 26 & 27 of the General Conditions of Contract. Number of issues were framed and the Tribunal after considering the submissions of the parties, gave a partial award on 31-7-2002 and held that the claim of the respondent-SAG was maintainable and was not barred by limitation while the counter claims of the appellant-NTPC was not admissible because the same were caught by the agreement contained in the minutes of meeting (MoM) dated 6th/7th April, 2000. Aggrieved against this partial award so far as it non-suited the appellant-NTPC in respect of their counter claims, the appellant-NTPC directly approached the High Court by filing an appeal.

3. The preliminary objection which was raised before the High Court was whether the appeal filed against the partial award of the ICC International Court of Arbitration was maintainable or not. Learned Single Judge of the High Court after elaborate discussions on the subject, took the view that the appeal under Section 37(2)(a) of the Arbitration & Conciliation Act, 1996 (hereinafter to be referred to as "the Act") was not maintainable. It was observed by the learned Single Judge as follows:

> "This Court on a thorough examination of the material obtaining on record, more particularly on a conjoint reading of the pleadings of the parties filed before the Arbitral Tribunal, the Terms of Reference framed by the International Chamber of Commerce, the written submissions filed by the parties before the Arbitral Tribunal prior and after the closure of the hearing, the tenor of the reasoning and finding recorded by the Arbitral Tribunal in its dispensation titled as "Partial Final Award" and on a true construction and scope of the provisions of Section 16 and Section 37 of the Act, is clearly of the view that the impugned dispensation dated 31-7-2002 rendered by the Arbitral Tribunal cannot by any stretch be said to be an order passed by the Tribunal either under the provisions of Section 16(2) or Section 16(3) of the Act and in any case deciding the question of jurisdiction in the negative which will fall within the ambit of appelable orders within the meaning of Section 37(2)(a) of the Act. In the opinion of this Court, the impugned partial Award is nothing but an Award of interim Award deciding the counter claims of the NTPC finally on merits. This Court, therefore, must hold that the present appeal filed by the NTPC against such a Partial Award under the provisions of Section 37(2)(a) of the Act is misconceived and is not maintainable.

Aggrieved against this order, the present appeal has been filed by the appellant-NTPC.

4. We have heard learned counsel for the parties and perused the records. The question before us in the present appeal is whether the view taken by learned Single Judge of the High Court that the appeal under Section 37 of the Act is maintainable against the interim award or not. Learned counsel for the appellant took us through all the details of the pleadings and tried to persuade us that the question of jurisdiction and limitation is involved, therefore, the appeal is maintainable under Section 37 of the Act. The first and foremost question before us is to examine the provisions of Section 37 read with Section 16 of the Act. Section 37 of the Act reads as under:

> "37. Appelable orders.- (1) An appeal shall lie from the following orders (and from no others) to the Court authorized by law to hear appeals from original decrees of the Court passing the order, namely:-

(a) granting or refusing to grant any measure under section 9;

(b) setting aside or refusing to set aside an arbitral award under section 34.

(2) An appeal shall also lie to a Court from an order granting of the arbitral tribunal-

(a) accepting the plea referred in sub-section (2) or sub-section (3) of section 16; or

(b) granting or refusing to grant an interim measure under section 17.

(3) No second appeal shall lie from an order passed in appeal under this section, but nothing in this section shall affect or take away any right to appeal to the Supreme Court."

So far as Section 37(1)(a) of the Act is concerned, it contemplates that no appeal shall lie from any orders except, namely granting or refusing to grant measure under Section 9. Section 9 deals with interim orders and Section 37(1)(b) relates to order passed under Section 34 i.e. setting aside or refusing to set aside an arbitral award under section 34. Sub-section (2)(a) of Section 37 provides that appeal shall also lie to the Court from an order of the arbitral tribunal accepting the plea under sub-section (2) or sub-section (3) of Section 16 and sub-section (2)(b) contemplates appeal against the order granting or refusing to grant an interim measure under section 17 i.e. at the time of pendency of the arbitration proceedings by the Tribunal. Sub-section (3) says that no second appeal shall lie from the orders passed in appeal under this section. Now we shall examine the scope of Section 16, which reads as under:

"16. Competence of arbitral tribunal to rule on its jurisdiction.- (1) The arbitral tribunal may rule on its own jurisdiction, including ruling on any objections with respect to the existence or validity of the arbitration agreement, and for that purpose,

(a) an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract; and

(b) a decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration cause.

(2) A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence; however, a party shall not be precluded from raising such a plea merely because that he has appointed, or participated in the appointment of, an arbitrator.

(3) A plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings.

(4) The arbitral tribunal may, in either of the cases referred to in sub-section (2) or sub-section (3), admit a later plea if it considers the delay justified.

(5) The arbitral tribunal shall decide on a plea referred to in sub-section (2) or sub-section (3) and, where the arbitral tribunal takes a decision rejecting the plea, continue with the arbitral

proceedings and make an arbitral award.

(6) A party aggrieved by such an arbitral award may make an application for setting aside such an arbitral award in accordance with section 34."

Sub-sections (2) & (3) of Section 16 deal with jurisdiction. Sub-section (2) of Section 16 says that a plea of lack of jurisdiction of the tribunal should be raised at the earliest i.e. not later than submission of statement of defence and it further says that a party shall not be precluded from raising such a plea merely because he has appointed, or participated in the appointment of an arbitrator. Sub-section (3) says that the plea that the arbitral tribunal is exceeding the scope of its authority shall be raised during the arbitral proceedings. A reading of sub-sections (2) & (3) of Section 16 makes it clear that it deals with jurisdiction i.e. that the arbitral tribunal has no jurisdiction or that the arbitral tribunal has exceeded its jurisdiction. In either of the two situations, a direct appeal is maintainable under sub-section (2) of Section 37. Therefore, in the light of this legal position we shall examine whether the tribunal while awarding an interim award has exceeded its jurisdiction or it had no jurisdiction whatsoever.

5. So far as sub-section (2) of Section 16 is concerned, we may straightaway dispose of the question of lack of jurisdiction on the part of the tribunal since that is not involved in the present case. But the emphasis in the present case was that the tribunal had exceeded its jurisdiction in passing a partial award. The facts have already been mentioned above. It may be relevant to mention here the relevant clause of the agreement which deals with arbitration. Clauses 26 & 27 of the General Conditions of Contract reads as under:

"26.0. SETTLEMENT OF DISPUTE

26.1. Any dispute(s) or difference(s) arising out of or in connection with the Contract shall to the extent possible be settled amicably between the parties.

26.2. Except as otherwise specifically provided in clause 27.0 herein under all unsettled dispute(s) or difference(s) arising out of or in connection with the Contract shall in the first instance be decided by an engineer whose decision shall be final and binding on the parties.

27.0 ARBITRATION

27.1. If any dispute or difference of any kind whatsoever shall arise between the Owner and the Contractor, arising out of the Contract for the performance of the Works whether during the progress of the Works or after its completion or whether before or after the termination, abandonment or breach of the Contract, it shall, in the first place, be referred to and settled by the Engineer, who, within a period of thirty (30) days after being requested by either party to do so shall give written notice of his decision to the Owner and the Contractor.

27.2. Save as hereinafter provided, such decision in respect of every matter so referred shall be final and binding upon the parties until the completion of the works and shall forthwith be given effect to by the Contractor who shall proceed with the Works with all due diligence whether he or the Owner requires arbitration as hereinafter provided or not.

27.3. If after the Engineer has given written notice of his decision to the parties no claim to arbitration has been communicated to him by either party within thirty (30) days from

the receipt of such notice, the said decision shall become final and binding on the parties.

27.4. In the event of the Engineer failing to notify his decision as aforesaid within thirty (30) days after being requested as aforesaid, or in the event of either the Owner or the Contractor being dissatisfied with any such decision, or within thirty (30) days, as the case may be, either party may require that the matters in dispute be referred to arbitration as hereinafter provided.

27.5. All disputes or differences in respect of which the decision if any of the Engineer has not become final or binding as aforesaid, shall be settled by arbitration in the manner hereinafter provided.

27.6. In the event of foreign Contractor, the arbitration shall be conducted by three arbitrators, one each to be nominated by the Owner and the Contractor and the third to be named by the President of the International Chamber of Commerce, Paris, save as above all Rules of Conciliation and Arbitration of the International Chamber of Commerce shall apply to such arbitrations. The arbitration shall be conducted at such places as the arbitrators may determine.

27.7. The decision of the majority of the arbitrators shall be final and binding upon the parties. The expense of the arbitration shall be paid as may be determined by the arbitrators. The arbitrators may from time to time, with the consent of all the parties enlarge the time for making the award. In the event of any of the aforesaid arbitrators dying, neglecting, resigning or being unable to act for any reason it will be lawful for the party concerned to nominate another arbitrator in place of the outgoing arbitrator."

6. In the present case, when the matter was approached by the respondent herein before the Engineer, he declined and therefore, the matter was referred to arbitration and the Arbitrators initiated the proceedings. In that a counter-claim was made. The counter-claim pertained to the issues which have already been settled in the minutes of meeting of 6th/7th April, 2000. Therefore, the stand taken by the respondent against the counter-claim was that it is without jurisdiction and it is not arbitrable because the counter-claim Nos. 1 to 7 have already been settled by the minutes of the meeting dated 6th/7th April, 2000. The Arbitrators after considering the counter-claim came to the finding that as per the minutes of meeting dated 6th/7th April, 2000 the counter-claims have already been settled. Each of the counter-claim was examined by the arbitrators. The Arbitrators in their award observed in Para 4.58 that in the Tribunal’s view none of these alleged Counterclaims was admissible and majority of these claims stood settled. It was also observed while discussing each of the counter claim that counter-claim Nos. 2,3,4,5,6,7,8,9 & 10 were already covered by the minutes of meeting dated 6th/7th April, 2000 and finally in paragraphs 4.60 & 4.61 it was observed as under:

"4.60 As will be seen, the majority of the Counterclaims is said to be caught by the settlement agreement of the 6th/7th April, 2000 which was the subject of the exchange of correspondence on the 5th May 2000 and the 10th May 2000 to which reference has already been made above. On the fact of it the MOM taken in conjunction with the subsequent correspondence clearly show a binding agreement for good consideration whereby a number of claims were compromised. Thus, paragraphs 2,3 and 4 reflect a discussion about critical components and operational guarantee. Those matters were settled as appears from paragraph 5.

"so as to avoid any arbitration on either side in order to ensure supply of critical components by SAG for the forthcoming overhauls.

> Accordingly, various issue (sic) were discussed and agreements were reached as per the following paragraphs as a package deal."
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> 4.61. What then follows is a series of specific agreements clearly recorded as such and thereby setling the disputes which then existed. And by paragraph 15 there was express confirmation by both parties:
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> "that there were no other issues to be resolved in first and third contracts."

7. The Tribunal also held that certain objections were taken with regard to the agreement not being binding which was disposed of by the Tribunal as it had no merits because the agreement was voluntarily made between the parties and it was not under duress or by deception. In paragraph 4.64 of the Award it was concluded that so far as counter claim Nos.2,3,4,5,6,8,9 & 10 were concerned, they were caught by settlement. So far as counterclaim No.7 was concerned, it was mere reservation of right and so far as counterclaim No. 1 was concerned, it was the opinion of the Tribunal that five purchase orders were confirmed and supplied and therefore, no dispute could arise. Accordingly, the Tribunal held that in view of settlement of issues in the minutes of meeting dated 6th/7th April, 2000 it was unnecessary for the Tribunal to consider any additional defence to the counterclaim and it was held that they were not admissible and not capable of being included in that reference to arbitration. Accordingly, this partial award was passed by the Tribunal. The Tribunal considered all these counterclaims and recoded the aforesaid finding.

8. Now, the only question that remains to be decided in the present case is whether against the order of partial award an appeal is maintainable directly under Section 37 of the Act or not. We have considered the submissions of learned counsel for the appellant and after going through the counterclaim and the partial award, we are of opinion that no question of jurisdiction arises in the matter so as to enable the appellant to file a direct appeal under Section 37 of the Act before the High Court. As already mentioned above, an appeal under sub-section (2) of Section 37 only lies if there is an order passed under Section 16(2) & (3) of the Act. Section 16(2) & (3) deals with the exercise of jurisdiction. The plea of jurisdiction was not taken by the appellant. It was taken by the respondent in order to meet their counterclaim. But it was not in the context of the fact that the Tribunal had no jurisdiction, it was in the context that this question of counterclaim was no more open to be decided for the simple reason that all the issues which had been raised in counterclaim Nos. 1 to 10 had already been settled in the minutes of meeting dated 6th/7th April, 2000 and it was recorded that no other issues to be resolved in 1st and 3rd contracts. Therefore, we fail to understand how the question of jurisdiction was involved in the matter. In fact it was in the context of the fact that the entire counterclaims have already been satisfied and settled in the meeting that it was concluded that no further issues remained to be settled. In this context, the counterclaims filed by the appellant was opposed. If any grievance was there, that should have been by the respondent and not by the appellant. It is only the finding of fact recorded by the Tribunal after considering the counterclaim vis-a-vis the minutes of the meeting dated 6th/7th April, 2000. Therefore, there was no question of jurisdiction involved in the matter so as to enable the appellant to approach the High Court directly. The High Court has also examined this matter and clearly observed in its order in paragraph 9 as follows:

> "Therefore, in the case in hand it is to be seen if the plea raised by the Siemens AG in regard to the counter-claims of NTPC was a plea pertaining to lack of jurisdiction of the Arbitral Tribunal or arbitrability of the said dispute within the meaning of Section 16(2) or Section 16(3) of the Act or it was the plea in regard to the merits of the counter-claim and its existence/subsistence on

the ground that the counter-claims raised by the NTPC stood settled and did not subsist any longer more particularly in view of the decisions taken by the parties as reflected in the MoM dated 6th and 7th April, 2000."

9. Therefore, the question of jurisdiction in the present controversy did not arise because the counter-claim was opposed by the respondent-SAG as the same has since been stood settled. In view of the finding of fact recorded by the Tribunal that all the counter-claims stood covered by the decisions of the minutes of meeting though it was initially opposed by the respondent-SAG that it was not arbitrable or the Tribunal could not go into counter-claim, despite that it examined on the merit of the matter and on the merits the Tribunal disposed of the counter-claim by giving partial award. We fail to understand how can the appellant-NTPC can raise the question of jurisdiction and bring its case under Section 16(2) & (3).

10. Learned counsel for the appellant tried to refer to some of the decisions of this Court but we do not think those decisions need to be noted in the present case as the whole question turned on the facts involved in the present case and we are satisfied that the partial award can be given and against this partial award the appellant has remedy under section 34 of the Act and thereafter they could file appeal under Section 37 of the Act. But no direct appeal would lie before the High Court because no jurisdictional issue was involved. The counter-claim was disposed of on the basic fact that the counter-claims had been settled by the MoM dated 6th/7th April, 2000. In this view of the matter, we need not refer to the decisions cited by learned counsel and other written submissions made by the appellant. We are satisfied that the view taken by the High Court is correct, appeal was not maintainable under Section 37(2) of the Act before the High Court and there is no ground to interfere with the order passed by the High Court. Accordingly, the appeal is dismissed with no order as to costs.