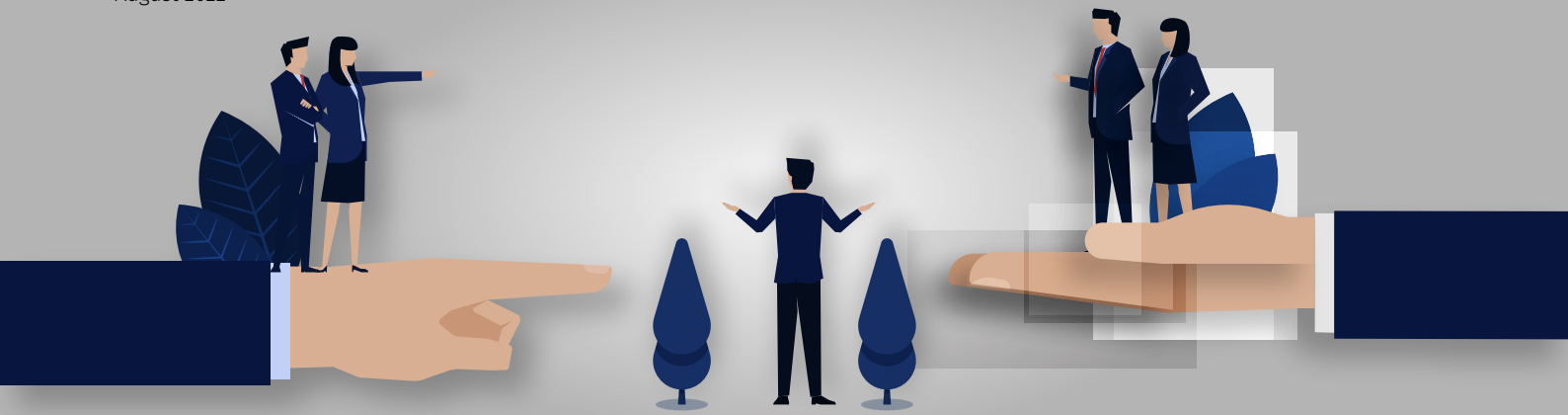


August 2022



## High Court of Calcutta clarifies whether a ruling under Section 16 of the Arbitration Act can be challenged under Section 34 of the Act<sup>1</sup>

### Brief Facts

Lindsay International Pvt. Ltd. (“**Petitioner**”) filed a petition under Section 34 of the Arbitration & Conciliation Act, 1996 (“**Act**”). The petition (“**Petition**”) was filed before a Single Judge of the High Court of Calcutta (“**Court**”) seeking setting aside of an order (“**Order**”) by which the Petitioner’s application under Section 16 of the Arbitration and Conciliation Act, 1996 (“**Act**”) was dismissed. Pertinently, Petitioner categorised the Order as an ‘Award/Interim Award’ and hence, moved the Petition under Section 34 for setting it aside.

The Petitioner submitted that the arbitrator, while adjudicating the issue of jurisdiction under Section 16 of the Act, should not have decided the issue of novation/supersession of the arbitration agreement as it related to the merits of the case. The other contention of the petitioner was that while rejecting the contention of novation, the arbitrator prejudged two additional issues (nos. 5 and 6), which were framed during the arbitration proceedings.

The petitioner argued that since the arbitrator went into the analysis of novation/supersession, the Order under Section 16 would qualify as an award since the arbitrator engaged with the merits of the dispute. On the other hand, the Respondent submitted that a petition under Section 34 is not maintainable as the Order was not an ‘interim award’ under the scheme of the Act, as it did not enter the merits of the case. The Respondent clarified that the arbitrator only dealt with the jurisdictional issue under Section 16.

**Issue:** Whether a decision under Section 16 of the Act can qualify as an “interim award” under Section 31(6) of the Act and consequently, be challenged under Section 34 of the Act?

### Judgment

The Court rejected the petition on the following grounds: (i) since the Order preceded framing of the issues, the Petitioner was fully aware of the Order at the time when it agreed to framing of issue nos. 5 and 6; (ii) the issue of the arbitration agreement being novated by a subsequent memorandum of understanding was raised by the Petitioner as a jurisdictional issue to be decided under Section 16. Thus, the arbitrator was called upon to decide the issue of novation as a question of jurisdiction, and not as an issue on the merits of the dispute.

The Court observed that there is no mention of the term ‘partial award’ in the Act. However, the term ‘interim award’ finds mention under Section 31(6) of the Act, which empowers the arbitral tribunal to make an interim arbitral award at any time during the arbitral proceedings. Thus, the Court held that an interim award must be an adjudication in respect of the dispute that the parties have brought before the tribunal in the form of a statement of claim and defence/counterclaim as per Section 23 of the Act. The Court thus used the terms ‘partial award’ and ‘interim award’

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interchangeably. The Court also held that as per Section 16, the arbitral tribunal can continue with the arbitral proceedings and make an arbitral award if it rejects the objection to jurisdiction, or to the existence or validity of the arbitration agreement. Thus, an order passed under Section 16(5) is an order on jurisdiction simpliciter, i.e., whether the tribunal can entertain any claim referred to it for adjudicating on the merits of the claim. Therefore, an order under Section 16(5) is not an ‘award’, interim or otherwise, and can be subject to scrutiny under Section 34 of the Act.

The Court addressed the nuances and contours of the *kompetenz* principle. While relying upon the High Court of Gujarat’s decision in **Nirma Ltd. v. Lurgi Energie Und Entsorgung GMBH, Germany**,<sup>2</sup> the Court held that a decision by a tribunal on the jurisdictional aspect will constitute an “order” and not an “award”.

The Court observed that it was the Petitioner who persuaded the tribunal to decide the jurisdictional issue first as a preliminary issue before entering the merits of the reference. Subsequently, the Petitioner changed its stance before the Court as per its convenience. Deprecating such practice, the Court reiterated the law settled by the Supreme Court in **Mumbai International Airport Pvt. Ltd. v. Golden Chariot Airport**<sup>3</sup> and **Suzuki Parasrampur Pvt. Ltd. v. Official Liquidator of Mahendra Petrochemicals Ltd.**,<sup>4</sup> namely that a litigant can take different stands at different times but cannot take contradictory stands in the same case. The principle posited in these judgments is that a litigant cannot modify its stance out of convenience in order to take advantage of court processes at different stages of the same proceeding.

## Analysis

The Court’s decision clarifies the scope of Section 16 of the Act and how questions of jurisdiction can be decided by a tribunal. Such decisions will not be construed as an award but would be treated as an order. Resultantly, an ‘order’ under Section 16 cannot be challenged before a Court under Section 34 of the Act as only ‘awards’ can be scrutinised by Courts. This decision is significant as it clarifies the scope of challenge under Section 34 and is in line with the principle of minimal judicial interference. Additionally, the Court also discouraged the practice of taking contradictory positions on questions of facts and reiterated that caution should be exercised while doing so.

## Endnotes

1 Authored by Smarika Singh, Partner, Yashna Mehta, Senior Associate, Adya Jha and Arjun Singh Rana, Associates; *Lindsay International Private Limited v. IFGL Refractories Limited*, A.P. No. 625/2019 and A.P. No. 627/2019, High Court of Calcutta, judgment dated 8 July 2022.

**Coram:** Moushumi Bhattacharya, J.

2 AIR 2003 Guj 145.

3 (2010) 10 SCC 422.

4 (2018)10 SCC 707.

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