(2009) 12 MAD CK 0120

Madras High Court

Case No: Transfer O.P. No. 628 of 2008 and O.A. No. 1078 of 2008 and A. No''s. 5264 and 5748 of 2008

Gammon India Ltd.		APPELLANT
	Vs	
Sankaranarayana Construction (Bangalore) Pvt. Ltd.		RESPONDENT

Date of Decision: Dec. 11, 2009

Acts Referred:

- Arbitration and Conciliation Act, 1996 - Section 2
- Civil Procedure Code, 1908 (CPC) - Order 12 Rule 5
- Constitution of India, 1950 - Article 9

Citation: (2011) 3 ARBLR 382 : (2010) 1 LW 325

Hon'ble Judges: V. Ramasubramanian, J

Bench: Single Bench

Advocate: R. Senthil Kumar, for the Appellant; T.A. Srinivasan, for the Respondent

Final Decision: Dismissed

Judgement

@JUDGMENTTAG-ORDER

V. Ramasubramanian, J.

The main transfer original petition O.P. No. 628 of 2008 is filed u/s 34 of the Arbitration and Conciliation Act, 1996, challenging an interim award passed by the Arbitrator, in I.A. No. 2 of 2006 in Arbitration Case No. 1 of 2006. Pending the main original petition, the Petitioner seeks an interim order of injunction in O.A. No. 1078 of 2008 to restrain the Respondent from executing the award. The Respondent in the main O.P. has come up with two applications in A. Nos. 5264 and 5748 of 2008, praying respectively (i) to reject the main O.P., as not maintainable and (ii) to permit them to withdraw the amount already deposited by the main original Petitioner in the execution proceedings.

2. Heard Mr. R. Senthil Kumar, learned Counsel for the Petitioner and Mr. T.A. Srinivasan, learned Counsel for the Respondent in the main original petition. Since the main O.P., is being disposed of by this order, I refer to the parties, only as per their status in the main original petition.

3. The Petitioner herein was awarded a contract for the construction of a Masonry Dam across the Tamiraparani river basin in Mekarai Village, Shenkottah Taluk, Tirunelveli District, by the Public Works Department of the Government of Tamil Nadu. A part of the said work namely, the construction of Masonry Spillway and Masonry non-overflow Dam from Block No. 11 to Block No. 18, was assigned by the applicant to the Respondent, by way of sub contract, under a work order dated 2.11.2000.

4. Disputes arose between the parties, compelling the Respondent herein to file an application u/s 11 of the Arbitration and Conciliation Act, 1996. By an order dated 16.4.2005 passed in O.P. No. 538 of 2003, Mr. Justice N.V. Balasubramanian (Retired) was appointed as the Arbitrator. He entered reference and passed an interim award dated 16.12.2006, directing the Petitioner herein to deposit a sum of Rs. 56,63,990/- to the credit of O.P. No. 538 of 2003 within 6 weeks and permitting the Respondent to withdraw the same after furnishing Bank Guarantee.

5. Challenging the said interim award, the Petitioner filed a petition in O.P. No. 51 of 2007, u/s 34 on the file of the District Court, Tirunelveli. But, on an application in I.A. No. 53 of 2007, taken out by the Respondent herein, the District Court, Tirunelveli, passed an order, returning the O.P., for presentation to the proper Court viz., this Court. Challenging the said order of the District Court, the Petitioner filed a Revision Petition in CRP(PD)(MD) No. 414 of 2008 on the file of the Madurai Bench of this Court. But the said Civil Revision Petition was dismissed on 11.9.2008, permitting the Petitioner to take the return of the papers from the District Court, Tirunelveli and to re-present it before the Original Side of this Court, within 2 weeks. Accordingly, the Petitioner took return of the papers from the District Court and represented the same in this Court.

6. But in the meantime, the Respondent initiated execution on the file of the High Court of Bombay in E.P. No. 85 of 2008 and the Petitioner was left with no alternative but to deposit the entire interim award amount with the Sheriff of Mumbai. Fearing that the Respondent may withdraw the amount, the Petitioner has filed, along with the main O.P., an application in O.A. No. 1078 of 2008 for an interim order of injunction restraining the Respondent from proceeding further with the execution.

7. The main O.P., was admitted by this Court on 7.10.2008 and notice was ordered in the injunction application. After service of notice on them, the Respondent has come up with two applications in A. Nos. 5264 and 5748 of 2008, praying respectively for rejection of the main O.P., and for permission to withdraw the amount now lying in

deposit in the execution proceedings.

8. On 23.10.2009, when the O.P., came up for hearing, there was no representation for the Respondent. Therefore, the petition was adjourned to 24.10.2009. Even on 24.10.2009, there was no representation for the Respondent. At that time, two things were pointed out by the learned Counsel for the Petitioner viz., (i) that the Petitioner had already deposited an amount of Rs. 56,64,080/- in E.P. No. 85 of 2008, filed by the Respondent, in the office of the Sheriff of Mumbai and (ii) that the Arbitrator had already completed the hearing 3 months ago and award was reserved.

9. Taking into account the above two submissions made by the learned Counsel for the Petitioner and also in view of the absence of the counsel for the Respondent, I disposed of the original petition by an order dated 24.10.2009, directing that the amount deposited in the office of the Sheriff of Mumbai, could be retained till the award is passed by the Arbitrator and also making it clear that after the award was passed, the successful party could withdraw the amount.

10. However, after I passed orders, the learned Counsel for the Respondent made a mention stating that he was not well and could not attend Court. He also pointed out that arguments had not concluded before the Arbitrator, as was represented by the learned Counsel for the Petitioner, at the time of disposal of the O.P., on 24.10.2009. Therefore, I directed the O.P., to be posted "for being mentioned" on 28.10.2009.

11. On 28.10.2009, the learned Counsel appearing on both sides made contradictory claims on the question whether the hearing in the arbitration had concluded or not. Therefore, I directed both counsel to file memos. After the counsel filed memos, it became clear that though the parties had filed written submissions before the Arbitrator, a request for oral hearing was made and the proceedings stood adjourned at that stage. Therefore, it was obvious that the premise on which I passed orders on 24.10.2009 in the O.P., was not factually correct. Hence, the order passed on 24.10.2009 became liable to be recalled and the O.P., was liable to be reopened for hearing. However, there was no written application by the Respondent for reopening and recalling. Therefore, I posed a specific question to Mr. R. Senthil Kumar, learned Counsel for the Petitioner, if he has any objections to the matter being heard on merits. He submitted that he has no objections and that he was prepared to argue the O.P., on merits and that the O.P., could be disposed of on merits, despite the fact that there was no formal application by the learned Counsel for the Respondent to set aside the ex parte order dated 24.10.2009. Therefore, the O.P., is disposed of on merits.

12. As stated earlier, this Original Petition challenges an interim award passed by the Arbitrator, directing the Petitioner to deposit a sum of Rs. 56,63,990/- to the credit of O.P. No. 538 of 2003 on the file of this Court and permitting the

Respondent to withdraw the same on furnishing Bank Guarantee. The circumstances under which the said interim order was passed by the Arbitrator are as follows:

(a) In the claim petition filed by the Respondent before the Arbitrator, they had claimed the following amounts:

V. STATEMENT OF CLAIMS:

	Rs. in Lakhs.
1.	68.84
2. Compensation towards reduction of value work	60.00
3. Interest payable for delay in payments	5.81
4. Interest from 7.4.2003 @ 21% upto 31.7.2005	58.00
5. Claim for cost of Arbitration proceedings (Amount)	33.00
	16.06
Total	241.71

(b) In response to the statement of claim filed by the Respondent, the Petitioner herein filed a "Statement of Defence and Counter Claim". In paragraph 15.1 of the Statement of Defence, the Petitioner herein had dealt with the claim under Item No. 1, in the following words:

15.1 Withholding of bills and adjusting the same for the amount due to the Respondent are in order. The Claimant has stated that an amount of Rs. 68.84 lakhs is outstanding and payment due. But as per the quantity arrived by initial level and final level taken jointly with the Claimant, the amount of bill due to Claimant works out to Rs. 56,63,990/- Annexure v. with working sheet is attached.

The Respondent submits that as a matter of fact an amount of Rs. 131,80,266/- is due to the Respondent from the Claimant vide details furnished in the counter claim. The amount of Rs. 56,63,990/- payable to Claimant has been adjusted towards the amount due to Respondent.

(c) In view of the above stand taken by the Petitioner in their statement of defence, the Respondent filed an application before the Arbitrator in I.A. No. 2 of 2006, seeking an interim direction to the Petitioner to pay the sum of Rs. 68.84 lakhs for the work done. The Petitioner filed a counter affidavit to the said interim application, contending that such an application was not maintainable under any provision much less Section 18 and that the very issue framed for arbitration u/s 11(4) before this Court, was as to whether the Petitioner was liable to pay Rs. 72,03,513/-, representing the amount due on bills, withheld amounts etc.

(d) The Arbitrator took into account the rival pleadings and arrived at a conclusion that there was an admission on the part of the Petitioner to the extent of Rs. 56,63,989.50. The Arbitrator also verified the details of the amount set out in the Final Status Bill found in Annexure v. to the Defence Statement. Therefore, taking into account Clause 31 of the contract which provided for payment of running bills within 7 days and also taking into account Exx.C-51 and C-59, the Arbitrator passed the interim award, as aforesaid.

It is in the background of the above facts that the challenge to the interim award is to be considered.

13. Mr. R. Senthil Kumar, learned Counsel for the Petitioner, assailed the interim award, primarily on 3 grounds viz.:

(i) that though an Arbitral Tribunal is empowered to pass an interim award u/s 31(6) of the Act, such a power would not include a power to pass an interim award on admission, as in the case of Order XII, Rule 6, Code of Civil Procedure;

(ii) that in any case, a decree/award on admission cannot be passed unless the admission was clear, unambiguous and unequivocal and that what was stated by the Petitioner in the Statement of Defence was not an admission at all; and

(iii) that what was claimed by the Petitioner in the Statement of Defence was only an adjustment, which was different from even a set off and that therefore, no interim award that would have the effect of upsetting such adjustment could be passed.

14. Elaborating on the first submission, the learned Counsel for the Petitioner contended that since an interim award, under the scheme of the Act, conclusively determines the rights of parties in so far as the matters covered thereby are concerned, the power conferred by Section 31(6) cannot be taken to include a power similar to the one conferred on a Civil Court under Order XII, Rule 6, Code of Civil Procedure. After drawing my attention to the definition of the word "Award" u/s 2(c) and the distinction drawn by the Apex Court in McDermott International Inc. v. Burn Standard Co. Ltd (2007) 3 Comp. LJ 213 between a partial award and an interim award, the learned Counsel submitted that an interim award is actually final, in respect of matters covered thereby. This is why, a petition u/s 34 is maintainable as against an interim award passed u/s 31(6), though no such petition is maintainable against an interim measure ordered u/s 17. Therefore, in essence, it is the contention of the learned Counsel for the Petitioner that a power to pass an interim award on admission, cannot be read into Section 31(6), by importing the provisions of Order XII, Rule 6, Code of Civil Procedure.

15. But the above contention of the learned Counsel for the Petitioner is actually fallacious. Under the Arbitration Act, 1940, the word "Award" was defined u/s 2(b) only to "mean an Arbitration Award". However, Section 27(1) of the old (1940) Act, empowered the Arbitrators, if they think fit, to make an interim award, unless a

different intention appeared in the Arbitration Agreement. Sub-section (2) of Section 27 made it clear that all references in the Act, to an award, would include references to an interim award. Thus, the omission to include an interim award, within the definition of the word "Award" u/s 2(b), was more than compensated u/s 27(2) of the 1940 Act.

16. It is common knowledge that the old Act was thoroughly overhauled and the Arbitration and Conciliation Act, 1996, was passed, keeping in view, the UNCITRAL Model Law on International Commercial Arbitration, 1985. The provisions of the Model Law, have been adopted verbatim in some places, adopted with variations in some places and not adopted in a few areas, in the new Act. The Model Law did not contain a definition of the word "Award", though it contained definitions of the words "Arbitration", "Arbitral Tribunal", "Court" etc. Article 9 of the Model Law enabling the parties to seek interim measures from a Court, before or during the arbitral proceedings, is the mother of Section 9 of the present Act though Section 27(1) of the 1940 Act may be its father. Similarly, Article 17 empowering the Arbitral Tribunal itself to order interim measures of protection, is the fore runner for Section 17 of the present Act. Article 31 of the Model Law contains 4 clauses, all of which are adopted and made into Sub-sections (1) to (5) of Section 31 of the present Act. After doing so, the Parliament thought fit to incorporate three more provisions in Section 31, in the form of Sub-sections (6), (7) and (8). Sub-section (6) empowers the Arbitral Tribunal to make an interim award and it reads as follows:
The Arbitral Tribunal may, at any time during the arbitral proceedings, make an interim arbitral award on any matter with respect to which it may make a final arbitral award

Thus, Section 31(6), is a deviation from the Model Law, in the sense that there is no reference to any interim award in the Model Law. Interestingly, Section 31(6) is also a deviation from Section 27(1) of the 1940 Act. u/s 27(1) of the 1940 Act, the power of the Arbitrators to pass an interim award, is made subject to the absence of "a different intention appearing in the Arbitration Agreement". But u/s 31(6) of 1996 Act, the power to pass an interim award is not made subject to any provision or lack of it in the Arbitration Agreement. Therefore, the intention of the Parliament in conferring a power u/s 31(6) of the new Act, both in deviation of the Model Law and also in deviation of Section 27(1) of the old Act, is quite clear.

17. After making a comparison between Section 14 of the (English) Arbitration Act, 1950 and Section 47 of the (English) Arbitration Act, 1996, "Russell on Arbitration" says in paragraph 6-008 (21st Edition-1997) as follows:

6-008 Power to make more than one award. An award may dispose of only some of the issues in the arbitration, leaving others to be determined in a subsequent award or awards. In some jurisdictions and certain sets of arbitration rules these awards are referred to as "partial awards". Section 14 of the Arbitration Act 1950 used the

term "interim award" and gave an express power to grant interim awards in the absence of agreement to the contrary. This has now been replaced by Section 47 of the Arbitration Act 1996 which provides that the Tribunal may make more than one award at different times on different aspects of the matters to be determined. Again this is subject to agreement otherwise by the parties. The section specifically avoids using the term "interim award" on the basis that it was thought to be confusing and time will tell whether the expression will fall into disuse. The section also makes clear that the Tribunal may, in particular, make an award relating -

(a) to an issue affecting the whole claim, or

(b) to a part only of the claims or cross-claims submitted to it for decision.

18. Section 39(1) of the (English) Arbitration Act, 1996 also makes a special provision, enabling the parties to confer upon the Arbitral Tribunal, by Agreement, the power to make provisional awards. The power so granted could include the power to grant any relief (on a provisional basis), which could be granted in a final award. Section 39(2) of the English Act, makes it clear that the provisional award that could be passed would include an order for payment of money or for disposition of property or an order to make interim payment on account of the costs of the arbitration. Sub-section (3) of Section 39 makes such provisional award subject to the final adjudication by the Tribunal.

19. Thus, it is seen that though the English Act of 1950 spoke about interim award, the English Act of 1996 enlarged the scope and power of Arbitral Tribunals, subject to contract between the parties, to pass provisional awards u/s 39 and also to pass more than one award at different times on different aspects of the matter, including a part of the claim or cross-claim u/s 47. But under the (Indian) Arbitration and Conciliation Act, 1996, a quantum leap was taken in the form of Section 31(6) by deviating from the Model Law and also making the power more pronounced than what it was u/s 27(1) of the 1940 Act.

20. A question as to what happens when an interim award is passed and on an item covered by the interim award, a different final award is passed later, fell for consideration in Satwant Singh Sodhi Vs. State of Punjab and Others, . In that case, the Arbitrator passed an interim award, allowing a sum of Rs. 7.45 lakhs towards item No. 1 of the claim. Subsequently, a final award was passed, granting a sum of Rs. 3.75 lakhs for all the claims, including the claim under item No. 1. The Trial Court made both the awards as rule of Court, but held that in so far as item No. 1 is concerned, the final award merged into the first award. When the High Court reversed the said decision and the matter landed up in the Supreme Court, it was held as follows:

The question whether an interim award is final to the extent it goes or has effect till the final award is delivered will depend upon the form of the award. If the interim award is intended to have effect only so long as the final award is not delivered it

will have the force of the interim award and it will cease to have effect after the final award is made. If, on the other hand, the interim award is intended to finally determine the rights of the parties it will have the force of a complete award and will have effect even after the final award is delivered.

21. In his book "Arbitration And Conciliation" (First Edition-2001, Page 225). Mr. V.A. Mohta, the learned author quotes John Parris on "Arbitration-Principles And Practice" as follows:

It is always open to the Arbitrator to make an interim award and frequently it is in the interest of the parties that he should do so.

22. In their book "The Law and Practice of Arbitration and Conciliation" (Second Edition-2006, Page 145), O.P. Malhotra and Indu Malhotra, the learned authors, say the following on interim awards passed on admission:

The Arbitral Tribunal is called upon to give a partial award particularly where certain items of claim is admitted by the opposite party. Such claim may be in the nature of interim relief or partial satisfaction of the claim. In some jurisdiction and certain sets of arbitration rules, these awards are referred to ''partial awards''. There is a sort of distinction between the ''interim award'' and the ''partial award'' in that an interim award is the determination of preliminary issues, such as jurisdiction of the Arbitral Tribunal or liability of the party while partial award has an immediate monetary impact. However, in practice, by and large, the terms ''interim'' and ''partial'' are used interchangeably.

23. Therefore, the power conferred by Section 31(6) cannot be artificially restricted, to exclude from its purview, the power to pass an interim award on admission. The very object of the Act is to provide an alternative dispute resolution mechanism, for the purpose of speedy resolution of disputes. Therefore, to say that one cannot read a power akin to Order XII, Rule 6, Code of Civil Procedure, into Section 31(6), would militate against the very object of the Act.

24. As a matter of fact, the same argument was raised before a single Judge of the Delhi High Court in Numero Uno International Ltd v. Prasar Bharti that the provisions of Order XII, Rule 6, Code of Civil Procedure, were not applicable to arbitral proceedings. But the single Judge repelled the contention. When the matter was taken to the Division Bench, in Numero Uno International Ltd. Vs. Prasar Bharti, that contention was given up. However, the question as to whether the pendency of a counter claim was sufficient to disentitle the claimant from an interim award on admission, was raised. The Division Bench of the Delhi High Court answered the question in the negative and held as follows:

No interference with an interim award would, however, be permissible only because the Defendant has made a counter claim or because some areas of dispute independent of the area covered by the interim award remains to be resolved.

Therefore, the first contention of the learned Counsel for the Petitioner is rejected.

25. The second contention of the learned Counsel for the Petitioner is that an admission, entitling a Plaintiff to a decree/award, should be positive, unequivocal and clear. I have absolutely no quarrel with the said position of law, which is well settled for a fairly long period of time. As pointed out by the Apex Court in Razia Begum Vs. Sahebzadi Anwar Begum and Others, , quoted with approval in Balraj Taneja and Another Vs. Sunil Madan and Another, , the provisions of Order XII, Rule 6, Code of Civil Procedure, have to be construed along with the proviso to Order VIII, Rule 5, Code of Civil Procedure. Therefore, it is trite to point out that a Court cannot act blindly upon the admission of a fact.

26. But unfortunately for the Petitioner, the Arbitrator in the case on hand, has not acted blindly on a statement made by the Petitioner in their Statement of Defence and Counter Claim. The Arbitrator has actually applied his mind to the question whether there was an admission on the part of the Petitioner. He has also applied his mind on the question whether such admission is clear, unequivocal and positive and whether there are other circumstances entitling the Respondent to an interim award on such admission.

27. As seen from the Statement of Claim filed by the Respondent before the Arbitrator, which I have extracted earlier, the first item of claim in paragraph V.1 is for Rs. 68.84 lakhs, alleged to be a payment pending corresponding to the payments received by the Petitioner from the Public Works Department. In paragraph 15.1 of their Statement of Defence and Counter Claim filed by the Petitioner before the Arbitrator, they claimed that "as per the quantity arrived by initial level and final level taken jointly with the claimant, the amount of bill due to the claimant works out to Rs. 56,63,990/-". After stating so, the Petitioner claimed in the second portion of paragraph 15.1 of their Statement of Defence that an amount of Rs. 131,80,266/- was due from the Respondent herein and that the amount of Rs. 56,63,990/- had been adjusted towards the said amount.

28. Again in Part-Ill of their Statement of Defence, which contained their Counter Claim, the Petitioner stated as follows:

The Respondent submits that the total amount to be recovered from the Claimant under above six items works out to Rs. 131,80,266/-. The total amount available with the Respondent by amount payable to Claimant towards balance works out to Rs. 56,63,990/-. Hence an amount of Rs. 75,16,276/- is due to Respondent with Annexure-XII.

29. Again in the "Prayer" portion, towards the end of Counter Claim No. 1 in Part-Ill of their Statement of Defence, the Petitioner prayed before the Arbitrator as follows:

(A) The claims made by the Claimant are not maintainable and deserves to be rejected except partial bill amount of Rs. 56,63,990/-, which is adjusted towards the

amount due to Respondent besides encashment of Bank Guarantee.

30. I do not think that there can be any admission, which is more clear, more positive and more unequivocal, than what is stated by the Petitioner in paragraph 15.1 and in the various portions of their Statement of Defence and Counter Claim filed before the Arbitrator, which are extracted in the previous paragraphs. As a matter of fact, in my opinion, what is stated by the Petitioner is actually more than a mere admission. The Petitioner has not only admitted their liability to the Respondent to the extent of Rs. 56,63,990/-, but also gone to the extent of adjusting the same towards the amount claimed by them against the Respondent. Unless the Petitioner was clear and categorical about their own liability to the extent of Rs. 56,63,990/-, they could not have given credit to the Respondent, to the extent of the said amount, so that the claim made by the Petitioner against the Respondent is reduced to that extent. An adjustment or appropriation would never take place, unless the party making such adjustment or appropriation, concedes its liability to that extent in clear cut terms. The Petitioner might have succeeded in creating a doubt in my mind, if the Petitioner had actually made a claim for the entire amount of Rs. 131,80,266/-. But by adjusting the amount of Rs. 56,63,990/- towards the said amount and by asking for a decree only in respect of the balance amount, the Petitioner has steered clear of any such doubt. Therefore, I hold that the Petitioner has clearly and categorically admitted their liability to the extent of Rs. 56,63,990/- before the Arbitrator and hence the Arbitrator was right in passing an interim award on the strength of such admission.

31. Emphasising the object underlying Order XII, Rule 6, Code of Civil Procedure, the Supreme Court held in paragraph-12 of its decision in Uttam Singh Dugal and Co. Ltd. Vs. Union Bank of India and Others, as follows:

12. As to the object of Order 12, Rule 6, we need not say anything more than what the legislature itself has said when the said provision came to be amended. In the Objects and Reasons set out while amending the said Rule, it is stated that "where a claim is admitted, the Court has jurisdiction to enter a judgment for the Plaintiff and to pass a decree on admitted claim. The object of me Rule is to enable the party to obtain a speedy judgment at least to the extent of the relief to which according to the admission of the Defendant, the Plaintiff is entitled". We should not unduly narrow down the meaning of this Rule as the object is to enable a party to obtain a speedy judgment. Where the other party has made a plain admission entitling the former to succeed, it should apply and also wherever there is a clear admission of facts in the face of which it is impossible for the party making such admission to succeed.

32. The above observations made in Uttam Singh case, were also quoted with approval in Charanjit Lal Mehra and Others Vs. Smt. Kamal Saroj Mahajan and Another, , where it was further held as follows:

In fact, Order 12, Rule 6, Code of Civil Procedure, is enacted for the purpose of and in order to expedite the trials if mere is any admission on behalf of me Defendants or an admission can be inferred from the facts and circumstances of me case without any dispute; then, in such a case in order to expedite and dispose of the matter such admission can be acted upon.

33. What after all, could be called an admission ? A statement made by the Respondent/Defendant/opposite party in a proceeding, which by itself is sufficient, without anything more, for a Court/Tribunal to render a decision or pass an order/decree/award, without any further enquiry, on the whole or any part of the claim/claims, could be called, in simple terms, as an admission. A person who claims to have adjusted an amount due from him to another against his own claim, actually makes it clear that the Court need not spend any time on adjudicating his liability to that extent, as he had already given credit to the other and adjusted the same towards what is due to him. If this is not admission, I do not know what else could be. Therefore, the second contention is also rejected.

34. The third contention of the learned Counsel for the Petitioner is that an adjustment stands on a different footing than a set off or counter claim. In this connection, the learned Counsel relied upon the opinion of the Division Bench of the Delhi High Court in Cofex Exports Ltd. Vs. Canara Bank, . In paragraphs-8 to 10 of the said decision, the Delhi High Court held as follows:

8. A Defendant has a right to defend himself by raising all possible pleas permitted by the law. No Court-fee is leviable on a written statement. The nature of the several pleas which can be taken by a Defendant faced with a suit for recovery of a debt, in so far as relevant for the purpose of the present order may broadly be classified as payment, adjustment, set off and counter-claim.

9. A payment is the satisfaction or extinguishment of a debt prior to the filing of the written statement.

10. An adjustment contemplates existence of mutual demands between the same parties in the same capacity. The broad distinction between a payment and an adjustment is that in an act of payment one party deals with the other, which in an adjustment it is an act of me party himself prior to the filing of the written statement though the benefit of both is claimed by raising a plea in the written statement.

35. The distinction between an adjustment, set off and counter claim, is by now well settled. In Union of India v. Karam Chand Thapar and Bros. (Coal Sales) Ltd 2004 (3) SGC 50, the distinction between an adjustment and set off and the distinction between a legal set off and an equitable set off, were brought out by the Apex Court in paragraphs-14, 15 and 18, as follows:

14. On general principles supported by rationality and reasonability, it appears to be a sound proposition that a person who is obliged to pay a sum of money to another

person and also has in his hands an amount of money which that other person is entitled to claim from him, then instead of physically entering into two transactions by exchanging money twice that person may utilize the money available in his hands to satisfy the claim due and legally recoverable from such other person to him. However, this equitable principle is not one of universal application and has its own limitations.

15. "Set-off" is defined in Black''s Law Dictionary (7th Edn., 1999) inter alia as a debtor''s right to reduce the amount of a debt by any sum the creditor owes the debtor; the counterbalancing sum owed by the creditor. The dictionary quotes Thomas W. Waterman from a Treatise on the Law of Set-Off, Recoupment, and Counter Claim as stating:

Set-off signifies the subtraction or taking away of one demand from another opposite or cross-demand, so as to distinguish the smaller demand and reduce the greater by the amount of the less; or, if the opposite demands are equal, to extinguish both. It was also, formerly, sometimes called stoppage, because the amount to be set off was stopped or deducted from the cross-demand.

18. What the rule deals with is legal set-off. The claim sought to be set off must be for an ascertained sum of money and legally recoverable by the claimant. What is more significant is that both the parties must fill the same character in respect of the two claims sought to be set off or adjusted. Apart from the rule enacted in Rule 6 abovesaid, mere exists a right to setoff, called equitable, independently of the provisions of the Code. Such mutual debts and credits or cross-demands, to be available for extinction by way of equitable set-off, must have arisen out of the same transaction or ought to be so connected in their nature and circumstances as to make it inequitable for the Court to allow the claim before it and leave the Defendant high and dry for the present unless he files a cross-suit of his own. When a plea in the nature of equitable set-off is raised it is not done as of right and the discretion lies with me Court to entertain and allow such plea or not to do so.

36. Incidentally, the author of the judgment of the Division Bench of the Delhi High Court in Cofex Exports Ltd v. Canara Bank, is also the author of the decision of the Apex Court in Union of India v. Karam Chand Thapar. The law laid down in Cofex Exports Ltd v. Canara Bank has also been followed in the recent decision of the Delhi High Court in Numero Uno International Ltd v. Prasar Bharti, which I have referred to in para-22 above. Therefore, it is clear that the law is well settled on the distinction between an adjustment and a set off/counter claim.

37. But what is the effect of such a distinction, on the interim award passed by the Arbitrator, which is the subject matter of the present petition ? Nothing, in my considered view. As seen from the pleadings, the relevant portions of which have been extracted above, the Petitioner claimed to have adjusted a sum of Rs. 56,63,990/- against his own claim of Rs. 1,31,80,266/-. Consequently, the Petitioner

has lodged a counter claim to the extent of Rs. 75,16,276/- before the Arbitrator. In other words, the counter claim of the Petitioner has come down to the extent of the amount admittedly payable by the Petitioner to the Respondent, which according to the Petitioner, had been adjusted out of Court. Therefore, the distinction between an adjustment and a set off/counter claim, has no bearing upon the interim award passed by the Arbitrator, on the admitted position. Consequently, the third contention of the Petitioner is also liable to be rejected.

38. Thus, all the three contentions raised by the learned Counsel for the Petitioner are bound to fail. Apart from this, it is also seen from the interim award passed by the Arbitrator that the award is a considered one. The Arbitrator has not solely proceeded on the basis of the admission made by the Petitioner. He has taken into account (i) Clause 31 of the contract, (ii) the documents produced by the Respondent as Exx.C-51 and C-59 which contained the details of pending payments and the details of the amount due (iii) the nature of the counter claim made by the Petitioner and (iv) the various decisions of the Supreme Court in Union of India (UOI) Vs. Raman Iron Foundry, , State Bank of India v. Ranjan Chemicals Ltd 134 Comp. Cases 2 and Punjab Urban Planning and Dev. Authority Vs. M/s. Shiv Saraswati Iron and Steel Re-Rolling Mills, . Therefore, the interim award cannot even be termed as one passed blindly on the strength of an admission made by the Petitioner. It is neither perverse nor arbitrary nor violative of any law. Hence, the same does not call for any interference.

39. In view of the above, the main original petition Tr.O.P. No. 628 of 2008 is dismissed. Since the Petitioner has already deposited the interim award amount in the execution proceedings, the application of the Respondent in A. No. 5748 of 2008 is allowed and they are permitted to furnish Bank Guarantee in the very same execution proceedings and withdraw the amount deposited therein by the Petitioner. There will be no order as to costs. As a consequence O.A. No. 1078 of 2008 is dismissed and A. No. 5264 of 2008 is closed in view of the order passed in the main O.P.