

IN THE SUPREME COURT OF INDIA
CIVIL ORIGINAL JURISDICTION
ARBITRATION PETITION (C) No.43 OF 2017

M/S RUBY CHEMICALS

... PETITIONER

VERSUS

M/S. ROBERTET SA

... RESPONDENT

O R D E R

1. The present petition seeking appointment of arbitrator under Section 11(6) of the Arbitration and Conciliation Act, 1996 (**the Act**) raises a piquant state of affairs.

2. Admittedly, M/s Robertet SA (**Respondent**), formerly M/s Charabot Group, entered into an agreement on 19.04.1995 with M/s Ruby Chemicals (**Petitioner**) which was signed by the Petitioner's proprietor on 23.04.1995 for purchase of aleuritic acid and its derivatives. The agreement contained an arbitration clause which reads as follows:

"All disputes arising in connection with this agreement shall be finally settled under the rules of conciliation and arbitration of the International Chamber of Commerce by one or more Arbitrators appointed in accordance with the said Rules".

3. Disputes and differences arose between the parties in respect of the said agreement prompting the Petitioner to file a suit before the High Court at Calcutta (CS No.622/2001).

The Respondent took out an application under Section 8 of the Arbitration and Conciliation Act, 1996 (A.P. No. 14 of 2003), which came to be allowed vide order dated 01.12.2003.

4. Thereafter, on 17.04.2008 the Petitioner made a request for arbitration before the International Chamber of Commerce (**'ICC'**) under the ICC Arbitration Rules, 1998 (**'ICC Rules'**). By letter dated 23.04.2009, ICC fixed advance on costs and recorded that the Petitioner had paid a sum of USD 70,000 as provisional advance on costs. By subsequent emails dated 13.07.2009 and 18.08.2009, the Secretariat of ICC intimated the Petitioner to put in the remainder of its share on advance on costs while also recording that the Respondent had not put in its share. It further directed that in the event the Respondent fails to do so, the liability would be borne by the Petitioner through substitution. Learned counsel for the Petitioner contends that due to non-cooperation of the Respondent in putting in its share of advance on costs, the arbitration proceeding before ICC failed to take off and stood withdrawn on 12.02.2010. In this backdrop, his client was constrained to take out an application under Section 11(6) of the Act for appointment of an arbitrator, which was initially disposed of by this Court vide order dated 24.10.2017 holding that the arbitration proceedings before ICC has since proved abortive, and the Petitioner would be permitted to pursue the suit (CS 622 of 2001). Such order, having been passed without notice to the Respondent, came to be recalled vide order dated 23.01.2026 and the matter was placed for fresh hearing.

5. Mr. Ritin Rai, learned Senior Counsel for the Respondent refers to Article 30 of the ICC Rules and contends that the default on advance of costs lay not only with the Respondent, but was also, in part, attributable to the Petitioner. In the alternate, he contends that it was open to the Petitioner to put in the costs on behalf of the Respondent and recover the same at an appropriate stage. Even post withdrawal, the same claim could be re-introduced in another proceeding under the ICC Rules. According to him, such state of affairs had not been correctly portrayed before the court earlier, and had led to the revival of the suit, which is impermissible in law.

6. We have considered Mr. Rai's submission in light of the material on record. Admittedly, the suit instituted by the Petitioner in the Calcutta High Court had been referred to arbitration under ICC Rules. The Petitioner accepted the order and had proceeded for arbitration before the ICC. Such endeavour, however, was rendered futile as the advance on costs were not fully paid. The Petitioner contends that such failure was primarily on account of the Respondent not putting in its costs. Contrarily, the Respondent argues that the Petitioner itself had not discharged its liability fully or resorted to Article 30 (3) of the ICC Rules to put in the costs entirely and subsequently recover it at an appropriate stage.

7. The emails exchanged between the Petitioner and ICC show that the Petitioner had initially deposited a portion of the advance on costs. However, considering the unwillingness of the Respondent to deposit its share, the Petitioner refrained from putting in the remaining portion of its share resulting in withdrawal of the proceeding.

8. Mr. Rai argues that such withdrawal would not result in an exhaustion of the arbitration clause and therefore the arbitration could still be revived in terms of Article 30 (4).

9. For better appreciation of such argument, Article 30 is set out hereinbelow:

"1

After receipt of the Request, the Secretary General may request the Claimant to pay a provisional advance in an amount intended to cover the costs of arbitration until the Terms of Reference have been drawn up.

2

As soon as practicable, the Court shall fix the advance on costs in an amount likely to cover the fees and expenses of the arbitrators and the ICC administrative costs for the claims and counterclaims which have been referred to it by the parties. This amount may be subject to readjustment at any time during the arbitration. Where, apart from the claims, counterclaims are submitted, the Court may fix separate advances on costs for the claims and the counterclaims.

3

The advance on costs fixed by the Court shall be payable in equal shares by the Claimant and the Respondent. Any provisional advance paid on the basis of Article 30(1) will be considered as a partial payment thereof. However, any party shall be free to pay the whole of the advance on costs in respect of the principal claim or the counterclaim should the other party fail to pay its share. When the Court has set separate advances on costs in accordance with Article 30(2), each of the parties shall pay the advance on costs corresponding to its claims.

4

When a request for an advance on costs has not been complied with, and after consultation with the Arbitral Tribunal, the Secretary General may direct the Arbitral Tribunal to suspend its work and set a time limit, which must be not less than 15 days, on the expiry of which the relevant claims, or counterclaims, shall be considered as withdrawn. Should the party in question wish to object to this measure, it must make a request within the aforementioned period for the matter to be decided by the Court. Such party shall not be prevented, on the ground of such withdrawal, from reintroducing the same claims or counterclaims at a later date in another proceeding.

5

If one of the parties claims a right to a set-off with regard to either claims or counterclaims, such set-off shall be taken into account in determining the advance to cover the costs of arbitration in the same way as a separate claim insofar as it may require the Arbitral Tribunal to consider additional matters.”

10. The scheme laid down under Article 30 reveals that initially the Secretary General may call upon the claimant to put in a provisional sum to cover the costs of arbitration till terms of reference are drawn up. Thereupon, the Court fixes the advance on costs for fees, the expenses of arbitrators as well as arbitration costs, and the parties are to pay the said advance on costs within the stipulated time. In the event of failure to do so, the Secretary General shall direct the arbitrator to suspend work along with withdrawal of the claims and Counter claims. If a party fails to pay its share, the other party is free to pay the whole of the advance on costs in respect of the claim/counter claim. Withdrawal of any claim/counter claim due to non-payment of advance on costs, as aforesaid, would not pre-empt the party from reintroducing the same claim or counterclaim at a later date in another proceeding.

11. There is no dispute that while the Petitioner had put in the provisional cost of USD 70,000, the remainder of the advance on costs assessed at USD 305,000 remained unpaid. Consequently, the arbitration proceeding had stood withdrawn.

12. The moot issue which falls for consideration is whether such proceeding is required to be reintroduced in another proceeding under the ICC Rules or it is open to the parties to raise such claim before any other alternative forum, including a Court of law.

13. While party autonomy is the heart and soul of arbitration law, the question whether a party is bound to proceed for arbitration before the forum where the claim had stood withdrawn due to non-cooperation by the other party to put in its share of costs, must be understood in the backdrop of the fundamental right of access to justice.

14. As recounted earlier, in the present case, the Respondent's failure to put in its share of advance on costs, had cast an onerous burden on the Petitioner to shoulder the entire amount of advance on costs. As the Petitioner failed to arrange the entire advance on costs, it was faced with the inevitable withdrawal of its claims. Mr. Rai argues that Petitioner was fully aware of such liability and was not barred from reintroducing such claim before the ICC. We are unwilling to accept such averment at the behest of the Respondent who has resorted to an obstructionist approach before all fora to defeat the adjudication of the claims on merit. Firstly, in the civil suit instituted by the Petitioner before the Calcutta High Court, the Respondent prayed that the parties may be referred to arbitration. When the matter came to be referred to ICC for arbitration, the Respondent chose to derail such exercise by not putting in its share of costs. At the time of entering into the agreement, it was never contemplated by the Petitioner that the Respondent would blow hot and cold and scuttle the arbitration by not depositing his share of costs. It is true that under such circumstances the Petitioner could have put in the whole costs and proceeded with the arbitration. However, such a step, bearing in mind the hardships and complexities in arranging foreign exchange

etc., would require the Petitioner to discharge an extremely onerous if not insurmountable burden, rendering the adjudicatory mechanism illusory for all practical purposes.

15. The Respondent's contention that he did not put in his share as the Petitioner's claim was inflated is most specious and inspires no confidence as the parties were to pay the advance on costs in equal share and no higher burden was placed on the Respondent as compared to that on the Petitioner.

16. Keeping in mind the obdurate refusal of the Respondent to deposit its share of advance on costs, we are of the considered view that any reference to fresh arbitration under Article 30(4) of the ICC Rules for reintroduction of the said claim would be futile and meet the same abortive end.

17. However, such obtuse stance of the Respondent cannot render the Petitioner remediless on account of his inability to arrange foreign exchange and deposit the whole advance on costs for arbitration. Accordingly, in order to balance equities and do complete justice, we invoke Article 142 and direct as follows:

- (i) As the arbitration arrangement between the parties is rendered unworkable at the behest of the Respondent, Petitioner is at liberty to institute a commercial suit before the Commercial Court of competent jurisdiction within 30 days, without recourse to pre-litigation mediation under Section 12A of the Commercial Courts Act, 2015.
- (ii) All other issues, including limitation, are kept open for adjudication by the said Commercial Court in accordance with law and in view of the observations made in this order.

18. The Arbitration Petition stands disposed of accordingly.

19. As a result, the pending interlocutory application also stands disposed of.

.....J.
(JOYMALYA BAGCHI)

.....J.
(V. MOHANA)

NEW DELHI
OCTOBER 01, 2026

ITEM NO.21

COURT NO.17

SECTION PIL-W

S U P R E M E C O U R T O F I N D I A
RECORD OF PROCEEDINGS

Petition(s) for Arbitration No(s).43/2017

M/S RUBY CHEMICALS

Petitioner(s)

VERSUS

M/S. ROBERTET SA

Respondent(s)

Date : 01-10-2026 This petition was called on for hearing today.

CORAM :

HON'BLE MR. JUSTICE JOYMALYA BAGCHI
HON'BLE MRS. JUSTICE V. MOHANA

For Petitioner(s) Ms. Mrinmoi Chatterjee- 3158, AOR
Mr. Syed Ehtesham, Adv.
Ms. Kirti Lal, Adv.

For Respondent(s) Mr. Ritin Rai, Sr. Adv.
Mr. Aseem Chaturvedi, Adv.
Mr. Vvv Sastry, Adv.
Mr. Arpit Kumar Singh, Adv.
Mr. Anuj Shrotriya, Adv.
FOR M/S. Khaitan & Co.- 1509, AOR

UPON hearing the counsel the Court made the following
O R D E R

1. The Arbitration Petition stands disposed of in terms of the signed order.
2. As a result, the pending interlocutory application also stands disposed of.

(SATISH KUMAR YADAV)
ADDITIONAL REGISTRAR

(PREETHI DILEEP KUMAR)
DEPUTY REGISTRAR

(Signed order is placed on the file)