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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

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Date of Decision: 06th May, 2022+ **FAO(OS) 3/2018 & CM APPLs. 9794/2020 & 9795/2020 & 9747/2020****M/S JAKKI MULL & SONS**

..... Appellants

Through: Mr Anirudh Wadhwa with
Ms Anushree Malaviya and
Mr Shaishir Divatia, Advocates

Versus

JAGDISH THAKRAL

..... Respondent

Through: Mr Arvind K. Gupta, Advocate

CORAM:**HON'BLE MR. JUSTICE NAJMI WAZIRI****HON'BLE MS. JUSTICE SWARANA KANTA SHARMA****JUDGMENT****NAJMI WAZIRI, J. (ORAL)**

The hearing has been conducted through hybrid mode (physical and virtual hearing).

CM APPL. 9795/2020 (exemption)

Allowed, subject to all just exceptions.

The application stands disposed-off.

FAO(OS) 3/2018 & CM APPL. 9794/2020 (stay)

1. In an application under Section 11 of the Arbitration and Conciliation Act, 1996 ("the Act") preferred by the respondent, a reply was filed by the appellants along with their counter claim. With the



consent of the parties, dispute was raised before the learned Arbitrator. On 11.01.2001, this Court noted as under:-

“Learned counsel for the parties are agreed that the disputes raised in the present petition as well as in the reply may be referred to the arbitration of Justice Jaspal Singh (Retd. Judge of this court).”

In this view of the matter, I appoint Justice Jaspal Singh (Retd. Judge) as an Arbitrator to decide the dispute between the parties. The parties are at liberty to approach the learned Arbitrator for any interim relief. The learned Arbitrator is at liberty to fix his fees and other miscellaneous expenses.

Accordingly, the petition and IA stand disposed of.”

(emphasis supplied)

2. The reference included the claim and the counter claim. On 28.04.2001, the learned Arbitrator passed the following order:-

“Statement of Claim stands filed. Reply to the Statement of Claim be filed within two weeks with advance copy to the other side. Copies of documents be also filed along with the Reply. The Respondent has already filed a Counter Claim. Reply to the same be also filed within 10 days along with copies of documents. Advance copies be furnished. Rejoinders be filed before the next date along with Affidavits regarding admission/denial of documents.

Put up on 18th of May, 2001 at 6.00 P.M. for framing of issues.

Arbitral fee would be Rs. 11,000/- per hearing to be shared equally by both the sides.”

(emphasis supplied)



3. In effect, replies were to be filed to the statement of claim and to the counter claim. The parties filed their respective replies. An application had been moved by the appellant seeking to amend the counter claim which was subsequently withdrawn. Thereafter, evidence was led. The parties were heard on their respective claims and counter claims. In the claim petition an award has been passed on the respondents. However, *apropos* the counter claim, the learned Arbitrator did not return a finding and has observed as under:-

“.....However, I need not deal with these Counter Claims because ultimately the application for amendment was withdrawn. Even otherwise these Counter Claims are beyond the scope of the reference.....”

4. What is to be seen from the above is that the proposed amendment was withdrawn and whatever may have been the merit of the appellant's counter claim as filed before this Court and on which notice had been issued by the learned Arbitrator on 28.04.2001 would remain unaltered, intact and alive. The mere withdrawal of the amendment application would not obliterate the counter claim itself, for whatever worth it may be.

5. Secondly, the reference by this Court to the learned Arbitrator was in respect to the disputes between the parties. Their disputes had already been recorded in the form of the claim and the counter claim. Therefore, the scope of reference included both the claim and the counter claim.



6. This appeal impugns the order of the learned Single Judge passed on 01.11.2017 which held *inter alia* that in the withdrawal of the amendment application there is an acknowledgment of the petitioner that it had not filed a counter claim.

7. The relevant paragraph in the amendment application is paragraph 13(k) which reads as under:-

“It is therefore most respectfully submitted that on account of not taking back the unsold stock, fixture and furniture etc. and threatening the respondent with dire consequences by the petitioner, the respondents have not been able to use their premises for more than six years. Because of this unlawful conduct of the petitioner, the respondents have become entitled for damages at least @ Rs. 1.5 lakhs per month from 01.10.1997 till 31.12.2003. The respondents are therefore entitled to an amount of Rs. 1,12,50,000/- for the aforesaid period calculated @ Rs. 1.5 lakhs per month. The respondents are also entitled to interest at least @ 18% per annum on the said amount till such time the aforesaid amount is paid to the respondent.”

8. Whereas the ground and substratum of the counter claim is in its paragraphs 12 and 13, which are reproduced hereunder:-

“12. Before the Sole Arbitrator the respondent filed its Statement of Claim. On the other hand, the petitioner, through its counsel, addressed a communication dated 25th January, 2001 to the Sole Arbitrator enclosing therewith a copy of the order dated 11th January, 2001 passed by this Court in the Arbitration Application no.119/2000, copy of Reply and Counter Claim and other documents which were placed on record before this Court and also copy of application under section 9 of the Act, with a request to enter upon reference in the



matter. As much reliance has been placed on this letter, the same is reproduced hereunder:

"An Arbitration Application No. 119/2000 was filed before the Hon'ble Delhi High Court by Shri Jagdish Thakral praying therein for appointment of an arbitrator for adjudication of the disputes detailed in para 7(k) of the petition. My clients, M/s Jakkimal & Sons & Ors. who were respondents in the arbitration application filed their reply and counter claim in the above-mentioned arbitration petition. The counter claim has been set out in para 12 of the reply and counter claim filed on their behalf.

The Hon'ble Mr. Justice Madan B. Lokur by an order dated 11.01.2001 has been pleased to appoint you as the arbitrator with the consent of the parties and has been pleased to refer the disputes raised in the arbitration application and in counter claim for adjudication.

I am, therefore, enclosing herewith the copy of the order dated 11.01.2001, the arbitration application No. 119/2000, the copy of the reply and the counter claim and the other documents which were placed on record before the Hon'ble Delhi High Court.

I am also enclosing the copy of the application under Section 9 of the Arbitration Act, which was filed on behalf of my clients. Hon'ble Mr. Justice Lokur, while referring the disputes for arbitration, has been further pleased to observe that the parties may approach the Ld. Arbitrator for any interim orders.

I, therefore, request you to kindly enter upon reference in this matter. You may kindly inform us the date and time convenient to you for



holding the proceedings in the present arbitration matter.”

13. *In the proceedings held by the sole Arbitrator on 28th April, 2001 while granting time to the petitioner herein to file reply to the statement of claim filed by the respondent herein, it was recorded that the petitioner herein (respondent in the arbitration proceedings) has already filed a counter claim. The respondent herein (claimant in the arbitration proceedings) was granted 10 days time to file reply to the same. The said order is reproduced hereunder:-*

“Statement of Claim stands filed. Reply to the Statement of Claim be filed within two weeks with advance copy to the other side. Copies of documents be also filed along with the reply. The respondent has already filed a counter claim. Reply to the same be also filed within 10 days along with copies of documents. Advance copies be furnished. Rejoinders be filed before the next date along with affidavits regarding admission/denial of documents.”

Put up on 18th of May, 2001 at 6.00 PM for framing if issues.

Arbitral fee would be Rs.11,000/- per hearing to be shared equally by both the sides.”

9. Withdrawal of the amendment sought through paragraph 13(k) would not negate the effect of paragraphs 12 and 13. The counter claim and that should have been adjudicated upon in terms of the reference.

10. Interestingly, in his affidavit in evidence, the appellant had reiterated as under:-



“19. The respondent herein also filed his evidence by way of affidavit before the Sole Arbitrator. Learned senior counsel for the petitioner has drawn my attention to opening sentence of paragraph 18(A) of the same to contend that a counter claim was indeed filed before the sole Arbitrator. The opening sentence is reproduced hereinbelow:

“18(A) I also adopt herein my rejoinder and reply to the reply-cum-counter claims of the respondents the contents of the same may kindly be read as part and parcel hereof which are not being repeated herein for the sake of brevity.”

11. Indeed, the respondent claims to have admitted to the existence of the counter claim inasmuch as in his evidence by way of affidavit before the learned Sole Arbitrator the opening sentence of the deposition records as under:-

“18(A) I also adopt herein my rejoinder and reply to the reply-cum-counter claims of the respondents the contents of the same may kindly be read as part and parcel hereof which are not being repeated herein for the sake of brevity.”

(emphasis supplied)

12. There is admission by the respondent of the existence of a counter claim, inasmuch as a reply to the same has been filed in terms of the aforesaid affidavit. Notice upon the counter claim had been issued, therefore, to that extent the learned Sole Arbitrator too acknowledged the existence of a counter claim. Therefore, as noted hereinabove that the withdrawal of the amendment application will not by itself negate or obliterate the counter claim, as had been raised



before this Court and which had been referred to the learned Arbitrator.

13. Mr Arvind K. Gupta, learned counsel for the respondent/claimant submits that first a claim has to be filed and only thereafter a counter-claim can be filed. Indeed, it was so done inasmuch as the claim which was sought to be referred under Section 11 of the Act before this Court was followed by a reply and a counter claim which were then referred to the learned Arbitrator. The procedure under Section 23 of the Act is *apropos* a claim and a reply thereto and the same would refer to a claim and a counter claim thereto. This procedure ensures that due opportunities are granted to the parties to put up their claims and that they be heard *apropos* the same. There is no dispute insofar it is recorded that the notice was issued regarding the claim and the counter-claim. The respondent refers to the dicta of the Hon'ble Supreme Court in ***State of Goa vs. Praveen Enterprises***; (2012) 12 SCC 581 which held *inter alia* as under:-

“24. Section 23 of the Act enables the claimant to file a statement of claim stating the facts supporting his claim, the points at issue and the relief or remedy sought by him and enables the respondent to state his defence in respect of those claims. Section 2(9) provides that if any provision [other than section 25(a) or section 32(2)(a)], refers to a "claim", it shall apply to a "counter claim" and where it refers to a "defence", it shall also apply to a defence to that counter claim. This would mean that a respondent can file a counter claim giving the facts supporting the counter claim, the points at issue and the relief or remedy sought in that behalf and the claimant (who is the respondent in the counter claim) will be



entitled to file his defence to such counter claim. Once the claims and counter claims are before the arbitrator, the arbitrator will decide whether they fall within the scope of the arbitration agreement and whether he has jurisdiction to adjudicate on those disputes (whether they are claims or the counter claims) and if the answer is in the affirmative, proceed to adjudicate upon the same.”

14. As discussed hereinabove, notice was issued on the claim as well as on the counter claim. Replies were filed. Evidence was led and then a decision was taken. In other words, the objective of section 23 of the Act has been satisfied i.e. natural justice was duly met. The relevant paragraphs of the impugned order are reproduced as under:-

“22. The Sole Arbitrator has rejected the Counter Claim filed by the petitioner herein on the ground that the application seeking amendment having been withdrawn by the petitioner, the same need not be dealt with. The Sole Arbitrator further holds that even otherwise the counter claims were beyond the scope of the reference. The relevant portion of the impugned award is reproduced hereinbelow:-

"Coming to the Counter Claims of the respondent it may be mentioned that the respondent had applied for amendment of the Statement of defence seeking expenses at the rate of Rs.3,060/- per month with effect from 1st of January, 2004 for keeping the unsold stock, Rs.38,183/- in respect of electricity connection and Rs.1.5 lacs per annum from 1st of October, 1997 till 31st December, 2003 on account of the shop having remained closed resulting in damages. It had also claimed interest at the rate of 18%. However, I need not deal with these Counter Claims because ultimately the



application for amendment was withdrawn. Even otherwise, these Counter Claims were beyond the scope of the reference. "

23. The first challenge of the learned senior counsel for the petitioner is on the finding of the Sole Arbitrator that the Counter Claims were beyond the scope of reference. He submits that this Court, in its order dated 11th January, 2001 passed in an Arbitration Application No. 119/2000, had specially referred the dispute raised in the Reply filed by the petitioner herein to the Arbitration. In the Reply, Counter Claim had been specially raised. It is, therefore, submitted that failure of the Arbitrator to adjudicate the Counter Claim filed by the petitioner amounts to misconduct and the Award is liable to be set aside."

15. The learned counsel for the respondent submits that there could have been no counter claim prior to the claim having been filed. The Court agrees with the submission. Surely, this should be the logical sequence and the sequence is seen in case history; when the section 11 petition was filed along with the claim, it was followed by the counter claim. Notices happened to be issued on the same date. There was no need necessarily to issue a notice on the claim on one day and on the counter claim on another day. The objective of the Arbitration Act is to find an expeditious adjudication of disputes between parties. Therefore, when the claim and counter claim were on record on the same day because of the prior history of litigation it was prudent and logical to issue notice on them both simultaneously. The objective of section 23 of the Act is met and this Court finds no error in the procedure adopted by the learned Sole Arbitrator. However, insofar as the learned Arbitrator has found that there was no counter



claim before him and / or that it stood obliterated in view of the withdrawal of the amendment application or that the counter claim was beyond the scope of reference, there is an error in the exercise of jurisdiction. The reference included the counter-claim, therefore, the appellant's counter-claim needs to be adjudicated upon.

16. The learned counsel for the appellant submits that pending the adjudication of their counter-claim, it would be iniquitous to expect the appellants to pay the monies in terms of the award.

17. The learned counsel for the respondent submits that there is no challenge to the award in favour of the respondent. The appellants only seek the setting aside of the order of the learned Single Judge dated 01.11.2017 in O.M.P. 30/2009. That being the position, for the aforesaid reasons in the impugned award only the findings qua the appellants' counter claim are set aside, without touching the other aspects of the award.

18. The appeal is disposed-off in the above terms. The pending application also stands disposed-off.

NAJMI WAZIRI, J

SWARANA KANTA SHARMA, J

MAY 06, 2022

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