

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

+ **OMP 30/2009**

*Reserved on: 24<sup>th</sup> October, 2017*

*Date of decision : 1<sup>st</sup> November, 2017*

M/S JAKKI MULL & SONS ..... Petitioner

Through: Mr.Sachin Dutta, Sr. Adv. with  
Mr.Sushil Shukla, Ms.S.Jain and Mr.Suhael  
Buttan, Advs.

versus

JAGDISH THAKRAL ..... Respondent

Through: Mr.Arvind Kumar Gupta,  
Mr.Prashant Bhardwaj, Advs.

**CORAM:**

**HON'BLE MR. JUSTICE NAVIN CHAWLA**

1. This petition under section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as Act) has been filed by the petitioner challenging the correctness and validity of the Award dated 22<sup>nd</sup> September, 2008 passed by the Sole Arbitrator in the arbitration proceedings between the parties.

2. The primary challenge to the Arbitration Award is on the ground that the Sole Arbitrator has committed a patent error in not considering the counter claim of the petitioner.

3. To answer the above contention, the following sequences of events are to be noted and appreciated.

4. The dispute between the parties had arisen out of an agreement dated 18<sup>th</sup> September, 1994 executed between M/s Child Shoppe through the respondent as 'Principal' and M/s Jakki Mull & Sons, the petitioner herein as the 'Agents'.

5. Clause -1 of the agreement provided that it shall come into force w.e.f. 1<sup>st</sup> October, 1994 and shall continue for a period of 3 years upto 30<sup>th</sup> September, 1997. Clause-2 of the agreement provided that the supply of goods by the Principal to the agents shall be on consignment basis only and the sale proceeds of the goods shall be remitted by the agents to the principles. Clause-10 entitled the agents to deduct 20% of net sales effected at the show-room as their commission excluding sales tax, except in the cases of clearance sales and bulk supplies to the schools and other institutions, on which a lesser commission was payable. Clause 22 of the agreement is important for the present adjudication and is therefore, reproduced hereunder:-

*“That in the event of termination of agreement or on the expiry of the stipulated time, agents shall surrender to the principles Furniture & Fixture provided by the principles at the said showroom and the principles shall remove the same at their cost together with unsold stocks.”*

6. Clause 23 of the agreement contains the arbitration agreement and provides that the disputes shall be referred for adjudication by a Sole Arbitrator.

7. It is the case of the petitioner that the agreement expired by efflux of time on 30<sup>th</sup> September, 1997 where after the petitioner had requested

the respondent to remove the goods as well as the furniture and fixtures. It is further contended that as the goods were not removed by the respondent from the showroom of the petitioner till August, 1998, the petitioner had no other option but to close down the showroom w.e.f. 1<sup>st</sup> September, 1998. The petitioner further alleges that by communications dated 22<sup>nd</sup> February, 2000, 11<sup>th</sup> April, 2000 and 22<sup>nd</sup> April, 2000, it had again reiterated its request to the respondent to remove its stock as well as the fixtures and fittings.

8. On the other hand, the respondent claimed that respondent had not been paid for the sales made by the petitioner after 21<sup>st</sup> June, 1997 till the closure of the shop on 1<sup>st</sup> September, 1998. The respondent further claimed damages for the closure of the shop w.e.f. 1<sup>st</sup> September, 1998.

9. Respondent invoked the arbitration agreement and filed Arbitration Application No.119/2000 before this Court seeking appointment of an Arbitrator.

10. The petitioner, who was the respondent in the above Arbitration Application, filed its Reply and Counter Claim in the above Arbitration Application. In the said Reply and Counter Claim, the petitioner herein claimed Rs.1.5 lacs per month from the respondent w.e.f. 1<sup>st</sup> October, 1997 till such time the respondent herein takes back the furniture and fixtures and unsold stock from the showroom. Such amount was claimed upto 30<sup>th</sup> September, 2000 and as a total amount of Rs.54 lacs. Paragraph 17 of the Reply and Counter Claim filed on behalf of the petitioner herein in the Arbitration Application is reproduced hereinunder:-

*“17) On the basis of the above-mentioned admission, the petitioner has raised the following disputes for reference for arbitration.*

*Claim No.I—Whether the applicant is entitled to accounts from the respondent w.e.f. 21.6.1997 to 31.8.1998*

*Claim No.II—Whether the claimant is entitled to damages for the closure of the shop at the rate of Rs.1.5 lacs per month; w.e.f. 1.09.1998?*

*Claim No.III—Whether the applicant is entitled to the value of stocks, furniture and fixtures at Rs.20 lacs because all the furniture and stocks, whichever are lying in the closed shop for the last two years, without proper cleaning, air and light must have been made useless and must have become a total loss on account of above factors and moreover in the present day of changing of fashions day by day, as such it is a total loss to the applicant:*

*Claim No.IV – Whether the applicant is entitled for interest @ 24% p.a. on the said amounts for presuit, pendente lite and future;*

*Claim No.V – Whether the applicant is entitled for the costs of arbitration proceedings.*

*It is respectfully submitted that the petitioner in claim No.3 has completely disclaimed/disowned the unsold stock furniture and fixtures and in his present petition has declined to take back the same on the plea that it has become junk for him and he is not interested to take back from the respondents. He has claimed compensation in this regard.*

*It is further respectfully submitted that under these circumstances the respondents were advised to take the help of a notary public for preparation of the inventory of the unsold stock furniture and fixture in as much as the petitioner had continuously, before the filing of the present arbitration petition, evaded to discharge his obligation in that regard as per the agency agreement and had now*

*completely disowned/disclaimed the same in his present petition before this Hon'ble Court.*

*Accordingly, Ms.Jaswant Kaur, a Notary Public of Patiala House, New Delhi, was requested/engaged to make an inventory on 14.10.2000. She visited the said shop at 11.00 a.m. on 14.10.2000 within 15 minutes thereof Sh. Jagdish Thukral came to the spot and despite objections from the respondents forced his entry in the said shop. He called police and claimed that he is the owner of the shop. He started making false allegations that the people of respondent no.1 have broken open into his shop and have removed his goods lying therein. He further threatened that if anyone from respondent no.1 enters into the shop, he will face dire consequences. Within short time his son Mr.Dimpal Thukral also came to the shop and started abusing and threatening the respondents. Under these circumstances the respondents were compelled to lodge a complaint with the police on 14.10.2000, a copy whereof is annexed as Annexure R-9. The respondents were also informed by the police officials that the petitioner has also lodged the complaint against the respondents, obviously, upon false and baseless allegations. The respondents along with their counsel had also met the ACP (Tilak Mark) on the same day i.e. 14.10.2000 and who after perusing all the documents given with the complaint by the respondents including the present arbitration petition filed by the petitioner, in their presence, directed the Additional SHO of the Connaught Place Police Station to give the necessary protection to the respondents against the threat of the petitioner. The copy of the report of the learned Notary dated 14.10.2000 is annexed hereto as Annexure -10.*

*That under these circumstances the respondents respectfully submitted that the only dispute to be decided is whether it is the petitioner or the respondents who is entitled to claim compensation? The respondents respectfully reiterate the appointment of Hon'ble Mr.Justice Satpal as an arbitrator and furtherance of their bona fide suggests the*

*name of Hon'ble Mr. Justice S.B. Wad (Retd.) or Hon'ble Justice Jaspal Singh (REtd.) for appointment as arbitrator is this Hon'ble Court deems that to be fit and appropriate. The answering respondents pray accordingly."*

11. This Court vide its order dated 11<sup>th</sup> January, 2001 appointed the Sole Arbitrator. The said order is of much relevance to the present adjudication and is therefore, reproduced in full:-

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

*In this view of the matter, I appoint Justice Jaspal Singh (Retd. Judge) as an Arbitrator to decide the disputes 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."*

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 25<sup>th</sup> January, 2001 to the Sole Arbitrator enclosing therewith a copy of the order dated 11<sup>th</sup> 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 the 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 28<sup>th</sup> 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 18<sup>th</sup> 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.”*

14. Though the proceedings were adjourned till 18<sup>th</sup> May, 2001 for framing of issues, counsel for parties submit that no issues were framed in the arbitration proceedings.

15. The petitioner thereafter filed ‘Reply Affidavit and Counter Claim on behalf of the Respondent’ dated 14<sup>th</sup> May, 2001.

16. Learned Senior counsel for the petitioner has placed reliance on paragraph 12,13 and 14 of the preliminary submissions made in the ‘Reply Affidavit and Counter Claim on behalf of the Respondent’ filed before the Sole Arbitrator and therefore, the same are reproduced hereinunder below:-

*“12) That thereafter the respondents herein fled their reply to the claim petition of the petitioner along with their counter claim. An application was also filed for interim protective orders against the illegal threat of the petitioner. The arbitration petition was listed before the Hon’ble High Court and on 11.01.2001 the following order was passed:*

*’11.1.2001*

*Present : Mr.K.Sharma for the Claimant/petitioner.  
Mr.Maninder Singh for the respondent.*

**AA No.119/2000 and IA No.11321/2000.**

*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 disputes 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.*

*Dasti.*

*Sd/-*

*11<sup>th</sup> January, 2001*

*Madan B. Lokur, J”*

*The perusal of this Order clearly shows that what has been referred for adjudication by arbitrator, by the Hon’ble Delhi High Court is the dispute raised in the arbitration petition by the petitioner and by the respondents in their reply along with the counter claim. The Hon’ble High Court has further gave the liberty to the parties for seeking appropriate interim orders from the learned Arbitrator.*

13) The respondents respectfully submit that pursuant to the order of the Hon'ble High Court dated 11.01.2001, the claim petition including the claims of the petitioner which stand referred for arbitration is already before this Hon'ble Tribunal and did not, thus, require the duplication of the same. It is further respectfully submitted that as held by the Hon'ble Supreme Court in the case of Orissa Mining Corporation Ltd. vs. Prannath Vishwanath Rawlley (1977) 3 SCC 535, once the reference of disputes for arbitration has been sought for by any party, it is only those disputes which are referred by the Hon'ble Court which are to be adjudicated by arbitration and it is not open to that party to seek to add/modify the claims which were directed to be adjudicated by arbitration by the Hon'ble Court. It is, therefore, respectfully submitted that the petitioner cannot be permitted, in the name of filing a claim petition, to change/modify the disputes which were the subject matter of the arbitration and which have been specifically referred for adjudication by the Hon'ble High Court. It is, therefore, respectfully submitted that the petitioner cannot be permitted to add/modify /change any of its claim now at this stage. The respondent, therefore, respectfully submit that the present statement of claim on behalf of the claims, to the extent it is beyond the statement of claim which was submitted before the Hon'ble High Court, is not maintainable and, therefore, deserves to be ignored.

14) Accordingly, the respondents respectfully submit that the reply of the respondents before the Hon'ble High Court to the claim petition is respectfully reiterated. However, without prejudice to the contentions on behalf of the respondents hereinabove, the para-wise reply to the statement of claim filed by the petitioner is as under:

17. He further makes reference to the final paragraph of the said Reply and Counter Claim on behalf of the Respondent. The same is reproduced as under:-

*“It is respectfully reiterated that the petitioner cannot be permitted to add/modify/change claims which have been referred for adjudication by the order of the Hon’ble High Court. All such additions/modification/changes in the claims of the present claim statement of the petitioner deserve to be ignored and are not maintainable. Without prejudice to this contention of the respondents, it is respectfully submitted that in any case all these claims are absolutely frivolous, baseless, imaginary, unsustainable in law and deserve to be rejected. There is no occasion for the petitioner even to contend any handing over of the possession to him by the respondents. That the averments made in paras 1 to 13 and the claims against the respondents are misconceived, incorrect, improper and are denied. The submissions made hereinabove are respectfully reiterated. It is therefore, respectfully submitted that the Hon’ble Arbitrator may be pleased to dismiss the claim of the Claimant and award the counter claim of the respondent as prayed for by the respondents.”*

18. The petitioner, thereafter filed an affidavit of Mr.Ranjan Jain by way of evidence before the Sole Arbitrator. In paragraph 31 of the same, a claim of Rs.1.5 lacs per month w.e.f. 1<sup>st</sup> October, 1997 till such time the goods are removed from the premises was made by the petitioner. The same is reproduced hereinbelow:-

*“I say that on account of not taking back the unsold stock, fixtures and furniture and threatening partners of M/s Jakki Mull & Sons and thereby preventing use of the shop premises for the last approximately 5 years, Mr.Jagdish Thakral is liable for damages @ Rs.1.5 lakh per month from 1.10.97 till such time the goods are removed from the premises and it is allowed to be used for running of the business. I submit that Mr.Jagdish Thakral is also liable to*

*pay to M/s Jakki Mull & Sons interest on the aforesaid amount @ 18% per annum.”*

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.”*

20. Thereafter the petitioner herein moved an application under Order VI Rule 17 of the Code of Civil Procedure seeking amendment to the ‘Counter Claim’. Learned senior counsel therefore, submits that admittedly there was a counter claim before the sole Arbitrator otherwise question of amending the same could not have arisen. It is, however, important to note here that the said application was dismissed as not pressed in the proceedings held on 4<sup>th</sup> January, 2005 before the Sole Arbitrator on a statement made by Mr. Ranjan Jain of the petitioner that he would seek remedy in the Court of law with regard to the reliefs sought through the amendment.

21. Reliance has been placed by the learned senior counsel for the petitioner on para 8 of the submissions filed by the Petitioner herein before the Sole Arbitrator, wherein it is prayed that the claim of the claimant (respondent herein) deserves to be dismissed and the counter

claim of the respondent (petitioner herein) for an amount of Rs.1.5 lacs per month (as set out before this Court) deserves to be allowed. Importantly, I find that excepting the said prayer, no submission have been made with respect to the amount so claimed or justification thereof in the said submission; no reference to any document or evidence has been made.

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.3,000/- per month with effect from 1<sup>st</sup> of January, 2004 for keeping the unsold stock, Rs.38,183/- in respect of electricity connection and Rs.1.5 lacs per annum from 1<sup>st</sup> of October, 1997 till 31<sup>st</sup> 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 11<sup>th</sup> 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.

24. I am in agreement with the submission made by the learned senior counsel for the petitioner. The order dated 11<sup>th</sup> January, 2001 had specially referred the dispute raised by the petitioner herein to the Sole Arbitrator. The Arbitrator, therefore, is wrong in holding that the Counter Claims were beyond the scope of reference.

25. Even otherwise, it is no longer *res integra* that where the Arbitration Agreement provides for reference of dispute between the parties to Arbitration, the Arbitrator will have jurisdiction to entertain any Counter Claim, even though it was not raised at a stage earlier to the stage of pleading before the Arbitrator. Reference in this regard may be made to the judgment of the Supreme Court in the case of ***State of Goa vs. Praveen Enterprises*** reported in (2012) 12 SCC 581.

26. The above finding of mine, however, would not be sufficient to set aside the impugned Award in the facts of the present case. It is to be noted that the Sole Arbitrator had been appointed by this Court on an application made under Section 11 of the Act. In exercise of this power, the Court merely appoints an Arbitrator. This is unlike sub-Section 4 of Section 20 of the Arbitration Act, 1940, which empowered the Court to make a reference to the Arbitrator. This distinction between Section 11 of the Act and Section 20 of the Arbitration Act, 1940 was explained by

Supreme Court in the case of *Praveen Enterprises (supra)* and the same is quoted below:-

*“25. Section 20 of the old Act required the court while ordering the arbitration agreement to be filed, to make an order of reference to the arbitrator. The scheme of the new Act requires minimal judicial intervention. Section 11 of the new Act, on the other hand, contemplates the Chief Justice or his designate appointing the arbitrator but does not contain any provision for the court to refer the disputes to the arbitrator. Sub-sections (4), (5) and (9) of section 11 of the Act require the Chief Justice or his designate to appoint the arbitrator(s). Sub-section (6) requires the Chief Justice or his designate to “take the necessary measure” when an application is filed by a party complaining that the other party has failed to act as required under the appointment procedure. All these sub-sections contemplate an applicant filing the application under section 11, only after he has raised the disputes and only when the respondent fails to co-operate/concur in regard to appointment of arbitrator.*

*26. Section 23 of the Act makes it clear that when the arbitrator is appointed, the claimant is required to file the statement and the respondent has to file his defence statement before the Arbitrator. The claimant is not bound to restrict his statement of claim to the claims already raised by him by notice, "unless the parties have otherwise agreed as to the required elements" of such claim statement. It is also made clear that "unless otherwise agreed by the parties" the claimant can also subsequently amend or supplement the claims in the claim statement. That is, unless the arbitration agreement requires the*

*Arbitrator to decide only the specifically referred disputes, the claimant can while filing the statement of claim or thereafter, amend or add to the claims already made.*

*27. Similarly, Section 23 read with Section 2(9) makes it clear that a respondent is entitled to raise a counterclaim "unless the parties have otherwise agreed" and also add to or amend the counter claim, "unless otherwise agreed". In short, unless the arbitration agreement requires the Arbitrator to decide only the specifically referred disputes, the respondent can file counter claims and amend or add to the same, except where the arbitration agreement restricts the arbitration to only those disputes which are specifically referred to arbitration, both the claimant and respondent are entitled to make any claims or counter claims and further entitled to add to or amend such claims and counter claims provided they are arbitrable and within limitation.*

*28. Section 11 of the Act requires the Chief Justice or his designate only to appoint the arbitrator(s). It does not require the Chief Justice or his designate to identify the disputes or refer them to the Arbitral Tribunal for adjudication. Where the appointment procedure in an arbitration agreement requires disputes to be formulated and specifically referred to the arbitrator and confers jurisdiction upon the arbitrator to decide only such referred disputes, when an application is filed under section 11(6) of the Act, alleging that such procedure is not followed, the Chief Justice or his designate will take necessary measures under section 11(6) of the Act to ensure compliance by the parties with such procedure.*

29. Where the arbitration agreement requires the disputes to be formulated and referred to arbitration by an appointing authority, and the appointing authority fails to do so, the Chief Justice or his designate will direct the appointing authority to formulate the disputes for reference as required by the arbitration agreement. The assumption by the courts below that a reference of specific disputes to the Arbitrator by the Chief Justice or his designate is necessary while making appointment of arbitrator under section 11 of the Act, is without any basis. Equally baseless is the assumption that where one party filed an application under Section 11 and gets an arbitrator appointed the arbitrator can decide only the disputes raised by the applicant under Section 11 of the Act and not the counter claims of the respondent.

30. 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.”*

27. Once an Arbitrator is appointed by this Court, Section 23 of the Act would take over. Section 23 of the Act provides for filing of pleading in the form of Statement of Claims and Defence before the Arbitrator.

28. In the present case, it is an admitted fact that no formal Counter Claim was filed by the petitioner before the Sole Arbitrator. Instead, the petitioner relies firstly on the ‘Reply and Counter Claims’ filed by it before this Court in Arbitration Application no.119/2000 read with order dated 11<sup>th</sup> January, 2001 (supra) passed by this Court.

29. Reliance has also been placed to the communication dated 25<sup>th</sup> January, 2001 addressed by the learned counsel for the petitioner to the Sole Arbitrator. Relying upon these documents, it is contended that the Counter Claim before the High Court should have been treated as a Counter Claim filed before the Sole Arbitrator as well.

30. I cannot accept the above plea. As observed by me above, the order dated 11<sup>th</sup> January, 2001 merely appointed a Sole Arbitrator for adjudication of the disputes between the parties. It was for the parties to file thereafter, their Statement of Claim, Statement of Defence and Counter Claim before the Sole Arbitrator in terms of Section 23 of the Act. The letter dated 25<sup>th</sup> January, 2001 merely informs the Arbitrator of

his appointment and forwards the documents that may be relevant for him to have a flavour of the dispute between the parties.

31. In fact, the last paragraph of the letter requests the Sole Arbitrator to enter upon reference in the matter. The Counter Claim cannot be stated to have been filed even before the Arbitrator had entered upon the reference.

32. Learned senior counsel for the petitioner then submits that in the 'Reply and Counter Claim filed on behalf of the Respondent' before the Sole Arbitrator, the Reply filed before the High Court had been reiterated, therefore, by incorporation the Counter Claim should be deemed to have been raised. I am afraid that even this submission of the learned senior counsel for the petitioner cannot be accepted.

33. Though it is correct that the Reply filed by the petitioner herein before the High Court in the Arbitration Application No.119/2000 had been referred to and the contents thereof were stated to be reiterated, in my opinion, this would not amount to raising of a 'Counter Claim'.

34. It is to be noted that there was no prayer made with respect to the amount of the 'Counter Claim', the period thereof or the basis thereof. The document, though titled as 'Reply and Counter Claim filed on behalf of the Respondent', was in fact, in nature of a reply alone.

35. Learned senior counsel for the petitioner also referred to the order dated 28<sup>th</sup> April, 2001 of the Sole Arbitrator wherein the Arbitrator records that the Counter Claim already stands filed. This, however, seems to be an apparent error in the order inasmuch as it is not the case of

the petitioner also that a separate Counter Claim had been filed by that date. In fact as noted above, reliance has been placed to the 'Reply and Counter Claim filed on behalf of the Respondent' which was filed before the Arbitrator only on 14<sup>th</sup> May, 2001 i.e. after 28<sup>th</sup> April, 2001 when the above record of proceedings were made.

36. As noted above, the petitioner had filed an application seeking amendment to the Counter Claim. Learned senior counsel for the petitioner, therefore, submits that a Counter Claim must be presumed to be on record, otherwise the question of amendment thereto would not have arisen.

37. This submission of the learned senior counsel for the petitioner, however, cannot be accepted as the application seeking amendment of the counter claim was withdrawn by the petitioner on 4<sup>th</sup> January, 2005 with liberty to seek remedy in accordance with law in a Court of law. It is important here to note that in this application seeking amendment, para 13(k) was sought to be added and the same is reproduced hereinbelow:-

*“13(k) 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.”*

38. A reading of the above paragraph shows that what was sought to be added was the claim of damages for the period starting from 1<sup>st</sup> October, 1997. If the said claim had already been raised by the petitioner, there was no need to add it by way of an amendment.

39. In my opinion, the amendment application, in fact, shows that even the petitioner was aware that the Counter Claim has not been filed by it.

40. The reliance placed by the learned senior counsel for the petitioner on the affidavit of evidence and the written submissions filed before the Sole Arbitrator is unfounded. Once it is held that there was no Counter Claim before the Sole Arbitrator, mere filing of an affidavit in support thereof or making a plea regarding the same in the written submissions would be of no avail.

41. Learned senior counsel for the petitioner submits that the Act does not prescribe any format for raising a Counter Claim. This may be correct, however, what is essential is that both the parties and the Arbitrator should at least be aware of the nature of such Counter Claim. The other party cannot be taken by surprise at the final stage of the proceedings. I have repeatedly asked the learned senior counsel to point out any proceeding before the Arbitrator through which it can be shown that the respondent herein was aware of the Counter Claim being raised against it. No such proceedings could be shown. No reply to the alleged Counter Claim was filed by the respondent, issues were not framed and

no averment regarding the alleged Counter Claim was made by the respondent in its affidavit by way of evidence. I am informed that the witnesses who filed their affidavits were not cross examined by either side and, therefore, even a question being put to the witness(es) regarding the Counter Claim did not arise.

42. In view of the above, I find that there was no Counter Claim before the Sole Arbitrator and the Award therefore, cannot be set aside merely on finding of the Sole Arbitrator that the Counter Claim was beyond the scope of reference. This observation was made by the Arbitrator, when he was dealing with the Counter Claim as was sought to be raised through amendment application, which was withdrawn by the petitioner on the very first date without even notice being issued to the respondent.

43. The second ground of challenge is with respect to the finding of the Arbitrator *qua* Claim No.1 of the respondent. In this claim, the Sole Arbitrator has awarded a sum of Rs.10,40,000/- in favour of the respondent for the sales effected by the petitioner between the period June 21, 1997 to August, 1998. It has been contended by the learned senior counsel for the petitioner that the assessment of the sales by the Sole Arbitrator is not based on any evidence, but is speculative and imaginary.

44. I may only note that the Arbitrator, for arriving at the above figure, has taken into account the daily sales statement issued by the petitioner itself for the period 21<sup>st</sup> June, 1997 to 30<sup>th</sup> August, 1997. He has further observed that the petitioner has failed to place on record its books of account, vouchers, credit card records in order to show that no business

was transacted after June, 1997. The claim of the petitioner that there was no sale made w.e.f. 20<sup>th</sup> June, 1997 was found to be incorrect.

45. In the light of the discussion of this claim by the Arbitrator, I cannot come to the conclusion that the finding arrived at by the Sole Arbitrator can be stated to be patently illegal so as to warrant interference by this Court in exercise of its jurisdiction under Section 34 of the Act.

46. Supreme Court in the case of ***Associate Builders vs. Delhi Development Authority*** reported in (2015) 3 SCC 49, while reiterating the limits of the power of the Court under Section 34 of the Act, in paragraph 33 held as under:-

*“33. When a court is applying the ‘public policy’ test to an arbitration award, it does not act as a court of appeal and consequently errors of fact cannot be corrected. A possible view by the arbitrator on facts has necessarily to pass muster as the arbitrator is the ultimate master of the quantity and quality of evidence to be relied upon when he delivers his arbitral award. Thus an award based on little evidence or an evidence which does not measure up in quality to a trained legal mind would not be held to be invalid on this score. Once it is found that the arbitrator’s approach is not arbitrary or capricious, then he is the last word on facts.”*

47. Applying the above test, it cannot be said that the impugned Award is against ‘public policy of India’.

48. The learned senior counsel for the petitioner further challenges the Award of the Sole Arbitrator awarding a sum of Rs.5.60 lacs to the respondent herein to the extent of valuation of the stock lying with the

petitioner. I find that for awarding the said figure, the Sole Arbitrator has relied upon the report of the Local Commissioner appointed by him for making an inventory of stock and principle of depreciation.

49. Applying the above test as laid down by the Supreme Court in *Associate Builders (supra)*, I do not find that awarding of the said amount of Rs.5.60 lacs in favour of the respondent, is liable to be interfered with by this Court in exercise of its limited jurisdiction under Section 34 of the Act.

50. In view of the above, I find no merit in the present petition and the same is accordingly dismissed with no order as to costs.

**NOVEMBER 01, 2017**  
RN/sd

**NAVIN CHAWLA, J**

नित्यमेव जयते