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IN THE HIGH COURT OF DELHI AT NEW DELHI

Date of decision: 6th April, 2018

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O.M.P. (COMM) 319/2016

UNION OF INDIA & ORS.

..... Petitioners

Through: Mr.Jagjit Sing, Mr.Preet Singh &
Mr.Narayan Dev Parashar, Advs.

versus

ARUN KUMAR GUPTA

..... Respondent

Through: Mr.Ashish Mohan, Mr.Mohit Kumar,
Mr.Chetan Rai Wahi & Mr.Akshit
Mago, Advs.

CORAM:

HON'BLE MR. JUSTICE NAVIN CHAWLA

NAVIN CHAWLA, J. (Oral)

1. This petition under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the 'Act') has been filed by the petitioners challenging the Arbitral Award dated 09.04.2015 passed by the Sole Arbitrator to the extent that by the Impugned Award the Arbitrator has terminated the arbitration proceedings even with respect to the Counter Claim filed by the petitioners.
2. The learned counsel for the petitioners submits that the arbitration proceedings with respect to the Counter Claim could not have been terminated as there was no allegation that the petitioners were also not pursuing the Counter Claim with rigour or seriousness before the Arbitrator. The only allegation was that the respondent was not pursuing its claim before the Arbitrator, and this was so recorded in the Impugned Award. The learned counsel for the petitioners further submits that the Arbitrator has taken note of the objection of the petitioners to the termination of the

proceedings as communicated by petitioners letter dated 02.03.2015 (wrongly recorded by the Arbitrator as 01.03.2015), however, has still terminated the proceedings with respect to the Counter Claim without giving any reason. He submits that the Counter Claim being separate and distinct from the claim, merely because the claim of the respondent was not being pursued by the respondent, the arbitration proceedings with respect to the Counter Claim could not have been terminated. He further submits that the petitioners had rendered separate fee to the Arbitrator with respect to the Counter Claim as well.

3. The learned counsel for the respondent, on the other hand, submits that only claims of the respondent had been referred to the Arbitrator for adjudication and in view thereof, the Counter Claim filed by the petitioners was not even maintainable before the Arbitrator. In this regard he relies upon the judgment of the Supreme Court in *State of Goa v. Praveen Enterprises*, (2012) 12 SCC 581 to contend that the Arbitrator would derive his jurisdiction only from the order of reference and cannot go beyond the same.

4. I have considered the submissions made by the counsel for the parties. The Arbitrator had been appointed by this Court vide its order dated 18.11.2013 in ARB.P. 405/2013 titled Arun Kumar Gupta v. Union of India and Anr. A reading of the order does not indicate that the Arbitrator had been appointed only with respect to the claims of the respondent and not with respect to the Counter Claim of the petitioners. The counsel for the respondent submits that this order has to be read alongwith order dated 15.07.2013 passed in O.M.P. 257/2012 wherein an undertaking on behalf of the petitioners was recorded that they would be appointing an Arbitrator. In

my view, this submission cannot be accepted as the Arbitrator had been appointed by this Court in its order dated 18.11.2013 only because the petitioners had failed to appoint an Arbitrator in terms of its undertaking in O.M.P. 257/2012 recorded in the order dated 15.07.2013. Admittedly, the order dated 18.11.2013 does not confine the powers of the Arbitrator to adjudicate only the claims filed by the respondent.

5. It is to be noted that unlike section 20 of the Arbitration Act, 1940, under Section 11 of the Arbitration and Conciliation Act, 1996 the Chief Justice (now the High Court) only appoints an Arbitrator upon failure of the parties to act in accordance with the appointment procedure. There is no provision of making reference of the disputes to the Arbitrator. This change of the jurisdiction of the Court was taken note of by the Supreme Court in its judgment in ***Praveen Enterprises (Supra)*** in the following words:-

“21. 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.

22. 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. Similarly Section 23 read with Section 2(9) makes it clear that a Respondent is entitled to raise a counter claim “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.

23. 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. 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.”

6. The Supreme Court, relying upon Section 23 and Section 2(9) of the Act held that the respondent in an arbitration proceeding can file a Counter Claim and once such Counter Claim is filed before the Arbitrator, the Arbitrator has to decide the same, including the question whether such Counter Claim falls within the scope of the Arbitration Agreement and whether he has jurisdiction to adjudicate all those disputes and if the answer is in the affirmative, proceed to adjudicate upon the same. The Supreme Court further held that a Counter Claim by a respondent presupposes the pendency of the proceedings relating to the disputes raised by the Claimant. The object for providing of Counter Claim is to avoid multiplicity of proceedings and to avoid divergent findings. The respondent in the arbitration proceedings has a choice of raising the disputes by issuing a notice to the Claimant calling upon him to agree for reference of his disputes to arbitration and then resort to an independent arbitration proceeding or raise his disputes by way of a Counter Claim, in the pending arbitration proceedings.

7. In ***Jakki Mull & Sons v. Jagdish Thakral***, 2017 SCC OnLine Del 11667, this Court reiterated that 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.

8. Section 32(2)(a) of the Act further provides that the Arbitral Tribunal

may order termination of the arbitral proceedings where the Claimant withdraws his claim, unless the respondent objects to the order of the Arbitral Tribunal and the Arbitral Tribunal recognises a legitimate interest on his part in obtaining a final settlement of the dispute.

9. A Counter Claim by its very nature is an independent claim raised by the respondent in the arbitration proceedings and even where the claim is to be dismissed for non-prosecution, the proceedings must continue with respect to the Counter Claim.

10. In *General Exports and Credits Ltd. v. Aditya Birla Finance Ltd.*, 2014 SCC OnLine Del 2009, this Court has held that:-

“21.....in case the statement of claim is not filed then the learned arbitrator would terminate the proceedings via-a-vis the statement of claim. It would not follow thus, that the proceedings qua the counter claim, which the respondent may have filed before the learned arbitrator, shall also stand dissolved.”

11. In the present case, the petitioners had objected to the termination of the arbitration proceedings. The Arbitrator, in my opinion, therefore, could not have terminated the arbitration proceedings with respect to the Counter Claim filed by the petitioners.

12. In view of the above, the Impugned Award is set aside leaving it open to the petitioners to initiate appropriate legal proceedings as may be open to it in law. If such proceedings are initiated, the petitioners shall be entitled to claim the benefits of limitation in terms of Section 43(4) of the Act.

13. The petition is allowed in the above terms, with no orders as to costs.

NAVIN CHAWLA, J

APRIL 06, 2018/rv