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IN THE HIGH COURT OF DELHI AT NEW DELHI

Date of decision: 1st October, 2018

+ O.M.P. (COMM) 343/2018

GOKUL PROJECTS

..... Petitioner

Through: Ms. Madhumita Bhattacharjee,
Advocate.

versus

CYCLONE ENERGY PVT. LTD.

..... Respondent

Through: Mr. A.K.Rudra, Advocate with
Mr. Vishweshar Mishra,
Advocate.

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 as 'Act') has been filed challenging the Interim Award/Order dated 25.05.2018 passed by the Sole Arbitrator, dismissing the application of the petitioner seeking permission to file its counter claim in the arbitration proceedings.

2. The Arbitrator had been appointed by this Court on an application filed by the respondent under Section 11 of the Act. On 08.09.2017, the Arbitrator passed a procedural order directing the respondent to file its statement of claim on or before 15.09.2017 and directing the petitioner to file its reply as also counter claim, if any, on or before 25.09.2017. By the subsequent order dated 10.10.2017,

further time was granted to the respondent to file its statement of claim and consequently, the schedule for filing of reply/counter claim was also extended.

3. The learned counsel for the petitioner submits that the petitioner received the statement of claim filed by the respondent only on 10.11.2017. Thereafter, the petitioner filed an application under Section 16 of the Act challenging the jurisdiction of the Arbitrator. This application was dismissed by the Sole Arbitrator vide order dated 15.01.2018.

4. The petitioner thereafter, in February, 2018 filed its statement of defence and the respondent filed its rejoinder thereto on 18.02.2018. On 19.02.2018, the Arbitrator directed that the issues would be decided as per the claims and further directed the parties to file their evidence by way of affidavit on 16.03.2018. It is at this stage that the petitioner, vide an application dated 11.05.2018 sought permission of the Arbitrator to file its counter claim. This application was opposed by the respondent and has been finally dismissed by the Arbitrator by way of the Impugned Order.

5. The Arbitrator in his Impugned Award/Order has held that the plea of the petitioner that the counter claim could not be filed due to inadvertence and also because the petitioner believed that the Tribunal lacked jurisdiction are contradictory in nature. He has further held that mere inadvertence without specifying the reasons for the same could not be a ground to allow filing of a counter claim at the later stage. The Arbitrator further records that the application had been filed when the case itself had been set out for trial and to allow

the petitioner to file the counter claim at this stage would cause delay in adjudication of the disputes between the parties.

6. The learned counsel for the petitioner submits that as the application under Section 16 of the Act had been dismissed by the Arbitrator only on 15.01.2018, the petitioner was not certain whether its counter claim would be maintainable once the petitioner is challenging the jurisdiction of the Arbitrator. It is only on a legal advice received later that the petitioner decided to raise its counter claim in the arbitration proceedings and immediately filed an application in that regard. She further submits that the arbitration proceedings were at an initial stage and only affidavits of evidence had been filed however, no witness of either side had been examined at the stage of filing of the application. She submits that therefore, no prejudice would have been caused to the respondent if the application had been allowed. In fact, if the application had been allowed, it would have resulted in avoiding multiplicity of litigation.

7. On the other hand, the learned counsel for the respondent submits that the arbitration proceedings had already reached the stage of recording of evidence. The issues had been framed and it was only at the stage when the respondent produced its witness for cross-examination that the petitioner, without giving any justifiable reasons, filed an application seeking permission to file its counter claim. He further submits that the counter claim is based on assertions which are on alleged causes of action which arose prior to the filing of the statement of defence and they are aimed only to prolong the adjudication of the claims of the respondent. He relies

upon the judgment of the Supreme Court in ***Ramesh Chand Ardawatiya v. Anil Panjwani***, MANU/SC/0387/2003. He further submits that the Arbitrator has rightly refused permission to the petitioner to file its counter claim at such a belated stage.

8. I have considered the submissions made by the learned counsels for the parties. It cannot be disputed that the petitioner was entitled to file its counter claim in the arbitration proceedings. In fact, such permission had been granted to the petitioner by the Arbitrator on earlier occasions. The petitioner, however, challenged the jurisdiction of the Arbitrator by filing an application under Section 16 of the Act which was dismissed by the Arbitrator vide order dated 15.01.2018. The petitioner, thereafter, filed its reply in February, 2018 and filed the application seeking permission to file counter claim dated 11.05.2018. Though, it may be correct that by that time, the Arbitrator had already passed the procedural order directing the parties to file their evidence by way of affidavits and fixing a date for cross examination of the witnesses of the respondent, the delay in filing of the application by the petitioner was not substantial in nature. It was around three months and it is not shown that between the two dates, any further substantial proceedings had taken place in the arbitration.

9. In ***State of Goa v. Praveen Enterprises***, (2012) 12 SCC 581, the Supreme Court, while considering the issue whether a party can raise a counter claim without first issuing a notice under Section 21 of the Act or raising such plea in answer to a petition under Section 11 of the Act filed by the other party, held that such counter claim

can be raised as the object of providing for counter-claims is to avoid multiplicity of litigations between the parties and ensure a complete and just adjudication of the disputes that have arisen between the parties. It was held as under:-

“32. A counterclaim by a respondent presupposes the pendency of proceedings relating to the disputes raised by the claimant. The respondent could no doubt raise a dispute (in respect of the subject-matter of the counterclaim) by issuing a notice seeking reference to arbitration and follow it by an application under Section 11 of the Act for appointment of arbitrator, instead of raising a counterclaim in the pending arbitration proceedings. The object of providing for counterclaims is to avoid multiplicity of proceedings and to avoid divergent findings. The position of a respondent in an arbitration proceeding being similar to that of a defendant in a suit, he has the choice of raising the dispute by issuing a notice to the claimant calling upon him to agree for reference of his dispute to arbitration and then resort to an independent arbitration proceeding or raise the dispute by way of a counterclaim, in the pending arbitration proceedings.”

10. In ***Ramesh Chand Ardawatiya*** (Supra), the Supreme Court had also explained the advantage of allowing a counter claim by stating that the purpose of the provision enabling filing of a counter-claim is to avoid multiplicity of judicial proceedings and save upon the court's time as also to exclude the inconvenience to the parties by enabling claims and counter-claims, that is, all disputes between the same parties being decided in the course of the same proceedings. The Court held that allowing such counter claim to be filed at a belated stage is a matter of discretion to be exercised by the court

keeping in view all the circumstances. In *Vijay Prakash Jarath v. Tej Prakash Jarath*, (2016) 11 SCC 800, the Supreme Court set aside the order passed by the High Court denying the opportunity to the Appellant therein to file counter claim because of delay of two-and-a-half years in filing of the same, by holding that no prejudice would have been caused to the other side if such counter claim would have been taken on record.

11. Keeping this objective and the fact that the arbitration proceedings were at an initial stage in view, the Arbitrator should have allowed the petitioner to file its counter claim, subject of course to cost so as to compensate the respondent for the delay in adjudication of its claim. As noted, the arbitration proceedings had not proceeded much further after the filing of statement of defence by the petitioner.

12. In view of the above, the Impugned Interim Award/Order dated 25.05.2018 is set aside. The counter claim filed by the petitioner shall be taken on record by the Arbitrator and would be adjudicated in the said proceedings.

13. I am informed that during the pendency of the petition, the Arbitrator has already recorded the evidence of the parties and arbitration proceedings are ripe for final hearing. The Arbitrator, therefore, is free to pass further procedural orders on the counter claim. Taking into account that further proceedings have taken place before the Arbitrator in the interregnum, the petitioner shall pay a cost of Rs.50,000/- for the delay that has and will be caused in the arbitral proceedings.

14. The petition is allowed in the above terms.

NAVIN CHAWLA, J

OCTOBER 01, 2018

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