

(2003) 03 BOM CK 0088

In the Bombay High Court

Case No : Arbitration Petition No. 176 of 1993 and 191 of 2000

Central India Builders

APPELLANT

Vs

The Food Corporation of India Project Implementation
Division
 The Food Corporation of India Project
Implementation Division Vs Central India Builders a firm

RESPONDENT

Date of Decision : 04-03-2003

Acts Referred:

Arbitration Act, 1940 — Section 30, 33, 41
Civil Procedure Code, 1908 (CPC) — Order 8 Rule 6A

Citation : (2003) 4 ALLMR 561 : (2003) 3 ARBLR 586 : (2003) 6 BomCR 264

Hon'ble Judges : F.I. Rebello, J

Bench : Single Bench

Advocate : D.D. Madan, B. Colabawala and Meeta Dagli, instructed by Mulla and R.V. Desai and A.D. Kango, for the Appellant;

Judgement

F.I. Rebello, J.—Both the petitioners are being disposed of by common order. Arbitration Petition No. 191 of 2000 by the petitioners therein is to set aside the Award dated 20th November, 1989. Arbitration Petition No. 176 of 1993 is filed by the petitioners therein for the Award to be made a decree of the Court. The petitioners are respondents in each other petition. The first petition, therefore, to be considered would be petition No. 191 of 2000 where the Award has been challenged.

2. A few facts may be set out which are necessary for disposing of the controversy that arises in the petitions challenging the award. The petitioners entered into an agreement with the respondents for the construction of godown at Panvel. The commencement of the work was to be from 24th November, 1983 and the work was to be completed within 24 months with the provision for extension of time. On 19th September, 1985 the respondents terminated the contract with the petitioners. In view of the termination the petitioners made several claims on the respondent Corporation. The claims as raised by the petitioners was referred to a Sole Arbitrator. On 20th August, 1986 the

petitioners filed their statement of claim. On 20th February, 1987 the Corporation filed written statement along with counter claim. On 28th November, 1989 an award came to be filed. It was filed in the Court on 4th August, 1990. On the award being filed and notice being given to the petitioners, the petitioner applied for certified copy of the award. On 3rd July, 2000 the petition challenging the award has been filed. Arbitration Petition No. 176 of 1993 was filed u/s 17 in the Year 1993. That was allowed by order dated 11th October, 1993. A review petition came to be preferred whereby on 28th April, 2000 order dated 11th October, 1993 was set aside.

3. At the hearing of the petition No. 191 of 2001 on behalf of the petitioners their learned Counsel has challenged the award on the following grounds:

It is contended that the petitioners had raised preliminary objection before the Arbitrator that the counter claim could not be included in view of the express language of Clause 25 of the Agreement. The counter claim of the respondent had not been referred to the Arbitrator by the authority empowered to refer the disputes under Clause 25. The Arbitrator, therefore, had no jurisdiction to entertain the counter claim and in that light of the matter the Award on that count is liable to be set aside. It is contended that there was no arbitrable dispute with reference to counter claim. The same was, therefore, premature and in that light of the matter the award is liable to be set aside. It is then contended that the award of the Arbitrator suffers from error of law apparent on the face of the record in as much as when the respondent filed counter-claim there was no amount due and payable. It is also contended that the award to the extent it held that the breach was on the part of the petitioners also discloses error apparent on the face of the record. Learned Counsel in support of the propositions has relied on various authorities. Which to the extent necessary would be considered while considering the contentions.

In answer on behalf of the respondents their learned Counsel contends that the counter-claim could have been entertained and it would be within jurisdiction. It is not a case of no jurisdiction and, therefore, in the light of the matter it cannot be said that the Arbitrator had no jurisdiction to decide the controversy. It is further contended that the Award does not disclose an error apparent on the face of the record. What the petitioners are contending it is argued is reappreciation of evidence which cannot be gone into. The Arbitration has considered the material on record and has arrived at a finding and in these circumstances no case is made out for interference with the award of the Arbitral tribunal. Learned Counsel has also relied on judgments to that effect.

The judgments relies upon the parties to the extent that they are necessary for consideration will be considered.

4. With the above we may consider the contentions as raised on behalf of the petitioners. In the written submissions on the issue of no jurisdiction to entertain the counter claim two submissions have been made. However, the effect of both

the submissions in sum and effect would be that, as the Arbitrator being a creature of statute could entertain only those disputes and/or claims referred to and no other claim. A dispute in the form of a counter claim could have been referred, that having not been done the award of the Arbitrator is without jurisdiction.

Clause 25 of the general terms and conditions contains the Arbitral clause. Reference may now be made to that clause which reads as under:-

"25. Except where otherwise provided in the contract, all questions and disputes relating to the meaning of the specifications, design, drawings and instructions hereinbefore mentioned and as to the quality of workmanship or materials used on the work or as to any other question, claim, right matter or thing, whatsoever, in any way arising out of or relating to the contract, designs, drawings, specifications, estimates or failure to execute the same whether arising during the progress of the work or after the work or after the completion or abandonment thereof shall be referred to the sole arbitration of a person appointed by the Managing Director, Food Corporation of India, at the time of dispute or if there be no Managing Director, the administrative head of the said Corporation as the time of such appointment. It will be no objection to any such appointment, that the arbitrator so appointed is a Corporation employee, that he had to deal with the matter to which the contract relates, and that in the course of his duties as Corporation employee he had expressed views on all or any of the matters in dispute or difference. The arbitrator to whom the matter is originally referred, being transferred or vacating his office of dying or being unable to act for any reason, such Managing Director or administrative head as aforesaid at the time of such transfer, vacation of officer or inability to act, shall appoint another person to act as arbitrator in accordance with the terms of the contract. Such person shall be entitled to proceed with the reference from the above at which it was left by his predecessor."

It is also a term of this contract that no person other than a person appointed by the Managing Director or Administrative head of the Corporation as aforesaid shall act as Arbitrator and if, for any reason, that is not possible, the matter is not to be referred to arbitration at all.

It is a term of the contract that the party invoking arbitration under this clause shall specify the disputes and/or differences to be referred to arbitration together with the amounts claimed in respect of each such disputes/difference.

The costs and venues of arbitration shall be at the discretion of the arbitrator.

Subject as aforesaid the provisions of the Arbitration Act, 1940, or any statutory modification or re-enactment thereof and the rules made thereunder and for the time being in force shall apply to the arbitration proceedings under this clause. The arbitrator(s) may from time to time with the consent of the parties enlarge the time for making and publishing the award.

New Clause in All Agreements (Arbitration Clause).

"In all the cases where the amounts of the aggregate of all the claim(s)/in dispute is Rs. 25,000/- and above, the arbitrator shall record his reason for the award."

It is also a term of the contract that if the contractor does not make any demand for arbitration in respect of any claims in writing within 90 days of receiving the intimation from the F.C.I. that the bill is ready for payment, the claim of the contractor will be deemed to have been waived and absolutely barred and the FCI shall be discharged and released of all liabilities under the contract in respect of those claims."

The principal submission therefore is as the claim of the Respondent Corporation had not been referred to the Arbitrator, the learned Arbitrator had no jurisdiction to entertain and decide the same. The record of the Arbitral Tribunal would disclose that as many as 27 issues have been framed. The last issue is as to what award. The issues settled were noted by the Advocate for the plaintiffs on 1st May, 1987. The issues were settled in terms of the notes maintained by the Arbitrator with consultation with the Advocate for the claimants and the respondents. No specific issue was framed as to the jurisdiction of the Arbitrator to entertain the counter claim in respect of claims which had not been referred to him. On the contrary issue No. 25 was whether the respondents were entitled to the amount claimed in para. 116 and 117 of their statement of counter claim and issue No. 26 pertained to interest. The claimants had filed their written statement to the counter claim filed by the respondent Corporation on 23rd March, 1987. The Claimants raised a preliminary objection to paragraphs 116 and 117 of the counter claim. I may reproduce the said objections as raised are reproduced below:-

"We submit that no such disputes have arisen between us and the respondents which are the subject matter of Respondents counter claim contained in paragraph 116 and 117 of the respondents reply-cum-counter claim and as detailed in the annexure submitted with the Respondents counterclaim. We submit that as no such disputes have arisen between us and the respondents regarding the said counter claim of the respondents the question of said counterclaim being considered or adjudicated by the learned Arbitrator does not arise."

It is, therefore, clear from those pleadings that the preliminary objection as raised by the petitioners herein was that there was no dispute between the petitioners and the respondents in so far as the counter claim is concerned and then the question of adjudication does not arise. The contention now raised before this Court that the Arbitrator had no jurisdiction to entertain the counter claim was not at all in issue. The contention regarding no jurisdiction to entertain the counter-claim and the contention that there is no dispute are different and distinct. In the instant case the contention raised was that there was no dispute

and if there was no dispute there was no question of the Arbitrator entertaining the said counter claim. It was not the contention of the petitioners herein that the respondents could not have raised counter claim before the Arbitrator. Their contention was that as there was no dispute it could not have been raised and not that it could not be considered without being referred to the Arbitrator in terms of Clause 25 of the contract which has been adverted to earlier. Therefore, clearly the contention as raised now for the first time before this Court and on which considerable time was argued by the respective Counsel was not at all in issue before the Arbitral Tribunal. On this point itself the 1st contention ought to be rejected.

5. However, assuming that the point can be raised being purely as to jurisdiction, the issue as to whether counter claim can be raised may now be answered considering the law as settled. Sir Michael Mustill and Stewart C. Bayd in *Commercial Arbitration* Second Edition have considered the issue of counter claim under four heads. We may consider the law as set out therein in so far as the issue which is presently in issue over here. The law set out, is thus:-

The fourth situation in which both the claim and cross-claim are arbitrable, is the one most commonly encountered in practice. The arbitrator should carefully consider whether the subject matter of the counter-claim is within the scope of the reference to him at the time of his appointment. If it is so, then it is up to him whether to allow the matter raised by the counter-claim or made the subject matter of a separate arbitration. In practice, we have never known the second course to be followed. If, on the other hand, the cross-claim was not a dispute which was the subject-matter referred to the arbitrator, he should not entertain it unless it raises a pure defence or unless the parties clearly agree that he has to have jurisdiction over it."

It is thus clear that a counter claim by way of defence has been treated differently than where a dispute is raised it is for the Arbitrator to decide whether the issue so entertained. The learned Authors have placed reliance in the case of *European Grain & Shipping Ltd. v. Johnston* [1982] 3 All ER 989. Before I proceed further, reference may also be made to Clause 3 of the conditions of the contract. In Clause 3(iv) the Engineer in charge after giving notice to the contractor to measure up the work of the contractor and to take such part thereof as shall be unexecuted out of his hand and to give it to another contractor to complete in which case any expenses which may be incurred in excess of the sum which would have been paid to the original contractor if the whole work had been executed by him (of the amount of which excess the certificate in writing of the Engineer in Charge shall be final and conclusive) shall be borne and paid by the original contractor and may be deducted from any money due to him by the Corporation under this contract or on any other account whatsoever or from his security deposit or the proceeds of sales thereof or a sufficient part thereof as the case may be.

It is, therefore, clear that Engineer in Chief after giving notice in case of

termination could have decided the amount claimed in which event the certificate in writing would be final and conclusive. The respondents then could have in respect of that money deducted it not only from the amount available in that contract but also of any other contract between the parties. The Engineer in charge by letter dated 29th January, 1987 addressed to the petitioners had quantified the amounts claiming in all a sum of Rs. 57,20,253.58 paise. The two major heads were the amount of risk and costs which was quantified at Rs. 31,20,787.40. This was worked out on the basis of the work done by the petitioners and the balance work based on the lowest tender percentage quoted by M/s. Gupta & Co. The other item was compensation for delay in execution of the work as per Clause 2 of the agreement at the rate of 10% of the contract price of Rs. 20,08,269.00. This was communicated to the petitioners by letter of 29th January, 1987. The counter claim as filed by the respondent as earlier stated was dated 28th February, 1987. Therefore, on 28th February, 1987 the respondents clearly would have that as a defence to the claim of the petitioners. The Arbitrator has not allowed the entire claim as contended on behalf of the respondents, but has only allowed a sum of Rs. 31,20,787.40. In fact the respondents need not have at all raised that issue as their claim and could have directly deducted that amount totally in the sum of Rs. 57,20,253.58 from the amounts of the petitioners in the hands of the respondents against that contract or any other contract. See H.M. Kamaluddin Ansari and Co. Vs. Union of India (UOI) and Others, . But once having raised the claim before the Arbitrator and calling upon the Arbitrator to decide that claim they had given up their right to claim any sum above Rs. 31,20,787.40. Therefore, against the claim raised in an amount over Rs. 63.00 lakhs by the petitioners the respondents were within their right to raise as a defence to the claim of the petitioners the amounts as claimed by them and set out in the letter dated 29th January, 1987.

6. Under Order 8 Rule 6A of the CPC a defendant apart from his right of pleading a set off can also against the plaintiff claim in respect of a cause according to the defendant against the plaintiff either before or after the filing of the suit before the defendant has delivered his defence or before the time limited for delivering his defence has expired. The principle underlying the said provision of the C.P.C. should be applied whenever applicable and as far as possible to avoid multiplicity of proceedings. All that the Arbitrator should take care is to consider whether the subject matter of the counter claim is within the scope of reference to him at the time of his appointment. If it is so then it is upto him whether to allow the matter raised by way of counter claim. In practice a separate arbitration is not required. The Arbitrator in such matters will have to consider the arbitral clause, and whether the claim arises from the arbitral clause. Under Clause 25 all questions and disputes relating amongst other claim arising out of or relating to the contract during the progress of the work or after the work abandonment can be referred to the sole arbitration of person appointed by the Managing Director. The pleadings in the instant case would disclose that on 14th August, 1985 in terms of paragraph 30 of the claims statement show cause notice was issued by the

respondents to the petitioners. Thereafter the respondents by their letter dated 19th September, 1985 rescinded the contract. The dispute raised by the petitioners were referred by letter dated 16th June, 1986. The decision under Clause 3(iv) was reached on 29th January, 1987 and served on the petitioners. They were called upon to make payment within 15 days. The respondents filed their counter claim only on 28th February, 1987. Clearly, therefore, on the issue being final the respondents could have filed the counter claim based on letter dated 29th January, 1987 as defence to the claim of the petitioners.

With the above we may now consider some of the judgments cited at the bar on behalf of the parties. In *Indian Oil Corporation Ltd. Vs. Amritsar Gas Service and Others*, the Apex Court noted that the cause to make a counter claim in the written statement would only arise after the order of reference. The reference covered all disputes between the parties to the suit. That ruling would, therefore, be of no assistance in deciding the controversy that has arisen herein. In *Premier Fabricators, Allahabad Vs. Heavy Engineering Corpn. Ltd., Ranchi*, the Apex Court did not consider some claims in a case of a non-speaking Award. This judgment was cited for the contention that the issue of jurisdiction had to be decided and the Award should be set aside on failure to decide the issue of jurisdiction. The other contention was that the preliminary objection as to maintainability of the claim had to be first decided. As it was not decided the Award was set aside. In *Food Corporation of India Vs. M/s. ANPO Shipping Co. Ltd. and Others*, the issue raised herein was not directly in issue. However, it was observed that the respondents were entitled to make a claim by way of counter-claim and that the Arbitrator by entertaining the counter claim could not be said to have exceeded his jurisdiction. The issue argued herein was not specifically argued though it can be said that the Court took the view that it was within the jurisdiction of the Arbitrator to entertain the counter claim. Similarly, in *K.V. George Vs. Secretary to Government, Water and Power Department, Trivandrum and Another*, the Apex Court noted that if the counter claim was not decided it will amount to misconduct on the part of the Arbitrator and the Award has to be set aside. That ruling is not in issue. In *Punj Sons Pvt. Ltd. v. National Aluminium Company Ltd.* and Anr. AIR 1999 SC 1547 when a counter claim was raised, the learned Arbitrator declined to entertain the counter claim. In an application filed u/s 33/41 of the Arbitration Act of 1940 the learned Civil Judge held that the counterclaim was maintainable. Civil Revision filed was rejected. In Appeal the Apex Court directed the parties to the same Arbitrator by treating the counterclaim as a reference of the dispute.

From what has been considered above what emerges is that if the counter claim falls within the arbitral dispute, then it is within the jurisdiction of the Arbitrator to consider it. When it is raised as by way of a defence there is no dispute that it can be entertained, but if it is not purely by way of a defence then it is within the jurisdiction of the Arbitrator considering the terms of the reference and if the claim arises from the contract. The Arbitrator having chosen to exercise discretion to consider it. In my opinion would call for no interference considering

that the reference to arbitration was agreed to by the parties as the term of the contract. Apart from that, by the arbitral clause the parties agreed that all the disputes be resolved by the arbitral process. If a suit had been filed on a cause covered by the arbitral clause that suit could have been stayed if the parties invoked the arbitral clause and Court would direct the parties to arbitration. The law as evolved now is to allow one forum to decide all disputes arising from the contract. The counter claim arose from the contract. That could have been the subject matter of a defence even without reference. Once it could be entertained and on the petitioner claims as raised were rejected, it was open to the Arbitral Tribunal to exercise its discretion to allow the claim as set out in the counter claim. In my opinion, therefore, that objection must be rejected.

7. We then come to the next contention as raised and which really was the contention as taken in ground 8.32 the real contention was as under:-

"In the present case admittedly till the filing of the counter claim the respondents had not made any claim on the petitioners as set out in the counter claim."

This was the crux of the matter based on which it was contended that as there was no dispute the Arbitrator could not have entertained the objection. It is not necessary to revert to all that has been set out earlier. Suffice it to say again, that the issue really is, was claim was filed. The argument is that this issue ought to have been raised and decided as a preliminary issue. As noted earlier no such issue was framed. It was open to the parties before the Arbitral Tribunal to call on the Arbitral Tribunal to frame such an issue. The issues were settled with the consent of the parties. For that matter the petitioners did not raise any grievance that such an issue had not been framed. Once an issue was not framed as to the purported preliminary jurisdiction there was no question of the Arbitrator deciding it as a preliminary issue. The issue was whether the petitioners were entitled to the amount based on the preliminary objection raised by the petitioners and which has been adverted to earlier. The basis for that contention was that no disputes had arisen between the petitioners and the respondents which could be the subject matter of the counter claim. I have already adverted to the various documents culminating in the letter dated 29th January, 1987 calling on the petitioners to pay the sum of Rs. 57,20,253.58 within 15 days. In answer to the counter claim it was not the case of the petitioners that they had paid the said amount. The respondents in paragraph 116 had specifically set out that they were entitled to be indemnified the losses suffered by breach of the contract on the part of the claimants because of which the contract had to be rescinded at the claimants risk. The respondents had, therefore, drawn the attention of the petitioners to their claim. In answer to para. 117 the defence raised was that there was no breach on their part and that they were not liable to pay the amount of Rs. 31,28,787.40 towards any risk or costs. Clearly, therefore, there was a dispute. Similarly dispute was raised for the sum of Rs. 20,08,268/-. Both the amounts claimed were within the contractual terms and fell within Clause 25. Once that be so and as there was a dispute and/

or clause it was within the jurisdiction of the Arbitrator to decide the counter claim raised by the respondents. In my opinion, therefore, there is no merit in the contention, which must be rejected. The argument that the amounts were not actually incurred will also have to be rejected considering the specific demand made by the respondents by letter dated 29th January, 1987.

It also cannot be said that the claim is premature. The reference to the judgment of Bharat Coking Coal Ltd. Vs. M/s. L.K. Ahuja and Co., to my mind is inapplicable.

8. The last contention is that the Award suffers from error apparent on the face of the record, as the counter claim was not considered even on merits. The learned Arbitral Tribunal has considered the case of both the parties including the issue as to who was in breach. On appreciating the evidence the learned Arbitrator has come to the conclusion that it is the petitioners who were in breach of the contract. That is purely a finding of fact on assessment of the evidence by the Arbitral Tribunal. It is not open to this Court to interfere with an award u/s 30 by reappreciating the evidence. It was within the jurisdiction of the arbitrator to appreciate the evidence led by the parties. The learned Arbitrator on evidence before him including the oral evidence of the petitioners witness has arrived at a conclusion that it was not even challenged by way of cross examination. For the purpose of satisfying myself on that aspect I have gone into the said evidence. It is so found. In the light of that the award does not suffer from any error apparent on the face of the record. In my opinion, therefore, the challenge to the award made in Arbitration Petition No. 191 of 2000 must be rejected and Petition No. 191 of 2000 must consequently be dismissed.

9. Consequent to the petition being dismissed and considering the Original Side Rules the petitioners in Arbitration Petition No. 176 of 1993 are entitled to the award being made a decree of the Court. In the light of that Arbitration Petition No. 176 of 1993 is made absolute in terms of prayer Clause (a).

The learned Arbitrator has awarded interest only from the date of the Award till decree of the Court. The petitioners have not challenged the award in so far as non-awarding of interest for each party. In the light of that it would not be possible to grant any relief to the Food Corporation of India in their petition. The amount under the decree will carry the same interest till realisation.

Parties/Authorities to act on an ordinary copy of this order duly authenticated by the Associated/Personal Secretary of this Court.