
(2008) 04 DEL CK 0127

In the Delhi High Court

Case No : C.S. (OS) No's. 1401 and 1925 of 1994

Kerala State Construction Corporation Ltd.

APPELLANT

Vs

Projects and Equipment Corpn. of India

RESPONDENT

Date of Decision : 07-04-2008

Acts Referred:

Arbitration Act, 1940 — Section 30, 33, 37(1), 37(3)

Civil Procedure Code, 1908 (CPC) — Order 8 Rule 6A

Limitation Act, 1963 — Article 55

Citation : (2008) 151 PLR 8

Hon'ble Judges : S. Ravindra Bhat, J

Bench : Single Bench

**Advocate : S. Balakrishnan, I.C. Kumar and Sri Narain Jha, for the Appellant;
R.K. Watel, for the Respondent**

Judgement

S. Ravindra Bhat, J.—These proceedings are under Sections 30/33 of the Arbitration Act, 1940; they question an interim Award made on 12th May, 1994, by the Arbitrators.

2. The facts are that the respondent successfully offered to execute a work contract, in response to a global tender by the Government of Libya. The contract was awarded on 6th December, 1979. On 29th January, 1980, the claimant, a Public Sector Undertaking of the State of Kerala, entered into an agreement with the respondent to work as its associate in regard to execution, completion and maintenance of the work that were part of the main contract between the Government of Libya and the objector/respondent which is also a Public Sector Undertaking but of the Central Government.

3. The agreement between the parties contained an arbitration clause which reads as follows:

12.1 If at any time any question, disputes or difference whatsoever shall arise between the First Party and the Second Party upon or in relation or in connection with this Agreement, either party shall forthwith give to the other party notice in

writing of the existence of such question, dispute or difference. The First Party and the Second Party shall use their reasonable endeavours to settle between themselves any dispute which may arise.

12.2. All questions disputes and differences which may arise between the First Party and the Second Party which cannot be settled amicably between them as to the intent or meaning of this Agreement, the respective rights and obligations of the parties hereto or any act, matter of thing done or to be done under this Agreement or in relation thereto shall be settled by means of Arbitration, by two Arbitrators, one to be appointed by each party to the dispute and the Arbitrators shall, before taking upon themselves the burden of reference, appoint an umpire. If the Arbitrators cannot agree on the Award, the matter shall be referred to the Umpire. The arbitration shall be conducted at New Delhi in accordance with the Indian Arbitration Act and Rules made thereunder.

4. Certain disputes apparently arose and the petitioner claimant sought reference. Two Arbitrators, one nominated by either party, entered upon reference. The claimant presented its statement of claims; after receiving it the respondent apparently filed a counter claim. At that stage, the claimant objected to the maintainability of the counter claim inter alia on several grounds, including that of limitation, maintainability and also that since no demand had been made under the arbitration clause and no notice under Clause 12.2 has been issued, the claim was not ad judicable .

5. The Arbitrator, framed five preliminary issues on 4.8.1991. These were in the following terms:

1. When did the breaches of contract on the part of Respondent arise as causes of action accruing to the claimant for making reference to arbitration u/s 37(3) read with Section 37(1) of the Arbitration Act?

2. When did the breaches of Contract on the part of the claimant arise giving rise to causes of action for the counter-claims (or set-offs) made the Respondent against the Claimant for making Reference to Arbitration in terms of Section 37(3) read with Section 37(1) of the Arbitration Act?

3. Is any claim or the claims barred by limitation under Article 55 of the Schedule to the Limitation Act?

4. Is any counter-claim or counter-claims barred by Limitation under Article 55 of the Schedule to the Limitation Act?

5. Are the counter-claim entertainable in this reference made by the Claimant.

6. The Arbitrators held that findings on preliminary Issues 1 and 3 could be rendered after considering the evidence, to be led in the further course of the proceedings. So far as preliminary Issues 2 and 4 were concerned, the Arbitrators held that the counter claims of the respondent were within the time prescribed. The 5th preliminary issue was, however, held against the respondent.

It is in respect of those findings (which led to rejection of the counter claim), that these objections have been preferred.

7. The Arbitrators noted in para 46 of the Interim Award that the question of maintainability of the counter claim had several nuances i.e. "difference facets". The Arbitrators listed at least three such distinct aspects arising from the issue. It was then noted in significantly enough in para 47 as follows:

47. The plea of the claimant, on which this issue is based, does not encompass all the facts of the question of maintainability. The claimant, for example, does not dispute the maintainability of the counter-claim on the ground that the counter-claim does not arise out of the agreement, or is not connected with the agreement, or does not arise out of the agreement. It is also not urged that the counter-claim is outside the terms of reference, or the order of reference, and are, therefore, not maintainable. There is also no express plea that they are not maintainable because having never been raised, before the reference, had not matured into a "dispute or difference", within the meaning of the Arbitration Act, and the arbitration agreement. This aspect may, however, be implied from the contention that the "demand" had not been made. The limited aspect of maintainability, which is expressly raised by the claimant, is that the counter-claim cannot be entertained in the "present reference" because respondent did not satisfy the condition precedent to any claim being made in arbitration and that conditions precedent is contained in Clause 12.1 of the Agreement, and, inter alia, obliges the parties to give "prior notice" of their claim to the other party.

8. The Arbitrators thereafter proceeded to analyse Clause 12.1 and rendered their findings in paras 52 and 53, after concluding that since no distinct demand had been made by the respondent counter claimant under Clause 12.1 it was not open to it to prefer counter claims in the course of arbitration proceedings initiated at the instance of the claimant/petitioner. The analogy to Order VIII Rule 6A, CPC was turned down.

9. Learned Counsel for the objector submits that the Arbitrators committed a manifest error in reading, in the mechanism of Clause 12.1, as a pre-condition for operation of Clause 12.2. According to him the said two clauses of the contract are separate and independent of each other. While 12.1 casts an obligation on the parties to endeavour at a settlement, Clause 12.2 was the agreed dispute resolving mechanism. In its terms "all disputes" had to be resolved through arbitration.

10. Learned Counsel relied upon several rulings including the judgment of this Court reported as C.L. Misra Vs. Nehru Bhawan Trust, , which had in turn relied upon a previous decision reported as Laminated Packings v. Union of India 1983 Rajdhani L.R. (Notes) 8. In that case, it was held that once disputes are referred to arbitration, the opposite party has a right to prefer its counter claim. Learned Counsel for the objector also relied upon a decision of the Supreme Court

reported as Indian Oil Corporation Ltd. Vs. Amritsar Gas Service and Others, where it was held that the occasion to make a counter claim in the written statement can arise only after an order of reference is made.

11. Learned Counsel submitted that having been satisfied about the maintainability vis-a-vis the question of limitation, and also having expressly recorded that the claimant did not dispute maintainability of the counter claim on the ground that it does not arise out of the agreement nor was connected with it or was outside the terms of reference, the Arbitrators should not have taken upon themselves to decide the issue of maintainability by constraining pleadings through implication as it were. He heavily relied upon the observations in para 47 and submitted that in the circumstances of this case, the Arbitrators should not have implied, by interpreting the word "demand", that the counter claim was not specifically made prior to the reference to the arbitration and, therefore, could not be entertained.

12. Learned Senior Counsel for the petitioner on the other hand urged that the precondition to every valid arbitration or even a claim is the existence of a dispute. He relied upon Clause 12.1 and contended that the respondent/objector, at no stage prior to the reference, had demanded any amount which it ultimately counter claimed. Learned Counsel relied upon the judgment of the Madhya Pradesh High Court reported in Dilip Construction Company Vs. Hindustan Steel Ltd., . In that case, the Court held that as follows:

The principles deducible from these authorities are:

(i) The existence of a difference or dispute is an essential condition for the Arbitrator's jurisdiction to act under an arbitration clause in an agreement;

(ii) The jurisdiction of an Arbitrator depends not upon the existence of a claim or the accrual of a cause of action, but upon the existence of a dispute. A dispute implies an assertion of a right by one party and repudiation thereof by another;

(iii) A failure to pay is not a difference, and the mere fact that a party could not or would not pay does not in itself amount to a dispute unless the party who chooses not to pay raises a point of controversy regarding, for instance, the basis of payment or the time or manner of payment.

13. Learned Counsel next relied upon the judgment reported as Bhagawati Oxygen Ltd. Vs. Hindustan Copper Ltd., . Learned Senior Counsel for the petitioner also relied upon the judgment of the Supreme Court reported as State of Rajasthan Vs. Nav Bharat Construction Company, . He relied upon the observations of the Court to state that the Arbitral Tribunal or the umpire - in that case the latter can decide only disputes referred and could not travel beyond it.

14. The factual narrative reveals that disputes between the parties stem from a contract entered into between them in 1980. The disputes were referred to arbitration in 1991. The respondent, which the main contractor filed its counter

claim, after the petitioner preferred its claims in arbitration. This was objected by the petitioner/claimant as not maintainable along with several other objections. An advertence to the findings on issue No. 5 in the interim Award impugned in the present case would reveal that most of the issues were held in favour of the respondent objector, particularly, those relating to limitation and other questions of maintainability. However, the narrow ground which persuaded the Arbitrators to hold against the respondent's counter claim was that no separate or distinct demand had been made and that no reference of those alleged disputes had been sought, for resolution through arbitration; therefore, the counter claim could not be adjudicated.

15. The findings in para 47 of the impugned interim award in the opinion of the Court make interesting reading. The Arbitrators construed the nature of objections articulated by the petitioner claimant. On most a counts, those objections were overruled. However, the Arbitrators felt compelled enough to examine that the nuances and facets of the expression "demand" and further imply that since no specific demand for any amount or dispute had been sought or made by the respondent, they had no jurisdiction to examine the counter claim.

The decision cited by the objector, particularly, the two decisions of this Court as well as the Supreme Court judgment in *Amritsar Gas Service and Ors.*, are a clear pointer to the principle that if disputes exist between the parties, the Arbitrators derive their jurisdiction to examine and adjudicate upon them. This, of course, subject to other well settled and well defined exceptions such as limitation, etc. The expression "all disputes" which is otherwise a widely accepted contractual norm and is factored into most arbitration agreements is in the opinion of the Court of sufficient amplitude to admit of all claims of the parties subject to other provisions of law. The petitioner contended "an argument which found favour with the Arbitrator" that in the absence of a notice under Clause 12.1 or endeavour (by parties) to settle specific disputes which were later founded in the counter claim, the respondent could not have approached the Arbitrator with their own claims, in reference made primarily at the instance of the claimant.

16. Though seemingly attractive, the argument has to be seen in the backdrop of the other conditions. Clause 12.1 is no doubt a part of the dispute resolving mechanism yet it is more in the nature of the obligation to explore attempts to settle (in the first instance) differences between the parties. However, Clause 12.2 has been cast imperative terms. It enjoins the parties to refer their disputes to arbitration. In fact, both parties are given the choice to appoint one of their nominees as their Arbitrator. In this case both exercised this option. There is nothing in the language of Clause 12.2 either express or through necessary implication to import the necessity of a notice, under Clause 12.1 or any other condition, as has been inferred by the Arbitrators in this case to set into motion the disputes resolution mechanism, by one party, independently of the other

parties recourse to arbitration. All questions, disputes and differences naturally imply existence of some differences of opinion between the parties. One cannot ignore is that the expression "all questions" disputes and differences" any include a wider spectrum of disputes and not be confined to what is demanded, by one party. For instance, if certain disputes and differences are to put to one party and either not expressly rejected or commented they can arguably be described as unresolved disputes. Likewise, there can be possibly a situation where the one party refer demands and obtain a reference of its disputes to arbitration. In its defence, the respondent/opposite party could well discover or choose to come forward with its claims which it had not been articulated till then or which could be set off in response to the claim.

17. From the above, it may be seen that the necessity of separate demand for arbitration would perhaps vary from circumstances to circumstance having regard to the contents of the counter claim or disputes. It is quite possible for a party in the first instance not to seek reference of its disputes, guided by the nature of the dispute or the quantum. However, having been arrayed as a party and made an answer to a possible demand it may well choose to raise its disputes. Therefore, on an overall construction of Clause 12.2 it cannot be said that the necessity of demand in its terms was imperative and that the absence of a specific notice for settling the disputes precluded a counter claim in arbitration.

18. In the opinion of the Court having concluded on almost of the issues in favour of the maintainability of respondent's counter claim the arbitrators fell into a manifest error in taking upon themselves the task of exploring the meaning of "demand" and implying that in the absence of a clear demand no counter claim was maintainable. To that extent the impugned interim award discloses an error which would fall within the parameters of the Court's jurisdiction under Sections 30 and 33.

19. Before conclusion, one cannot help but commenting on the peculiar facts of this case. The contract here was entered into in 1979; disputes were referred in 1991, the interim Award was made in 1994 and the correctness of that Award has now been decided 14 years later. This is exactly what the Arbitration Act either in its earlier version or the latter enactment ostensibly sought to avoid. Interlocutory motions, argued for years, leading to hyper-technical construction of pleadings, and findings inevitably resulting in layers of multifarious litigation were evils sought to be avoided, but what was exactly achieved. The result is that 17 years have passed by and the objective for entering into an arbitration agreement swift and in expensive resolution of disputes, is nowhere in sight.

I.A. 11992 of 1994

20. In view of the above findings, IA 11992/1994 has to succeed; it is therefore allowed In the circumstances of this case, the claimant petitioner M/s Kerala State Construction shall bear the costs of these proceedings, quantified at Rs. 50,000/-. All rights and contentions of the parties on the merits of the disputes

on which the Arbitrators have not pronounced their findings are hereby reserved and kept open.

21. CS (OS) 1925/1994 and CS (OS) 1401/1994 are disposed of in the above terms.