

(2020) 09 DEL CK 0154

In the Delhi High Court

Case No : Civil Miscellaneous (Main) No. 452 Of 2020, Civil Miscellaneous Application No. 22682 Of 2020

M/S Ved Prakash Mithal And Sons

APPELLANT

Vs

Principal Kirorimal College & Anr

RESPONDENT

Date of Decision : 24-09-2020

Acts Referred:

Code Of Civil Procedure, 1908 — Section 151, Order 7 Rule 11, Order 7 Rule 11(a), Order 7 Rule 11(d)
Arbitration And Conciliation Act, 1996 — Section 2(9), 8, 11, 23,

Citation : (2020) 09 DEL CK 0154

Hon'ble Judges : Sanjeev Sachdeva, J

Bench : Single Bench

Advocate : Peeyoosh Kalra, Ankur Chhibber, Anshuman Mehrotra, Harsh Dhankar, Parv Garg, Nikund Arora

Final Decision : Dismissed

Judgement

Sanjeev Sachdeva, J

1. The hearing was conducted through video conferencing.
2. Petitioner, by this petition, impugns order dated 25.08.2020 whereby the arbitral tribunal has dismissed the application filed by the petitioner under Order VII Rule 11 (a) and (d) read with Section 151 CPC for rejection of the counter claim filed by the respondent.
3. It is contended by learned counsel for the petitioner that the subject application was filed on three grounds; i) the counter claim being barred by limitation; ii) there was no specific reference of the counter claims to arbitration; and iii) the counter claim did not disclose any cause of action.
4. Learned counsel for the petitioner submits that since the Arbitrator has held that the question of limitation is a mixed question of fact and law and that the counter claim does disclose a cause of action and he is not pressing his challenge

to the said order on those two grounds and reserves his right to raise the plea of limitation in the arbitration proceedings.

5. Learned counsel submits that the challenge to the order dated 25.08.2020 is restricted to the plea that there is no specific reference by the Court of the counter claim to arbitration and as such the arbitral tribunal is precluded from entertaining the counter claims.

6. It is contended by learned counsel for the petitioner that Suit was filed by the petitioner for recovery on 04.09.2014. Written Statement was filed and thereafter the petitioner amended the Plaint and Written Statement to the Amended Plain was filed by the respondent.

7. Thereafter, respondent filed an application under Section 8 of the Arbitration and Conciliation Act, 1996 for referring the parties to arbitration, which application was allowed by order dated 30.04.2019.

8. Learned counsel submits that by till order dated 30.04.2019 was passed, no counter claim had been raised by the respondent and as such the reference was only of the claims raised by the petitioner and the Arbitral Tribunal has erred in not rejecting the claims under Order 7 rule 11 CPC.

9. Learned counsel submits that since there was no specific reference of the counter claim to arbitration, the arbitral tribunal is precluded from entertaining the same.

10. Reliance is placed by learned counsel for the petitioner on the judgment of the Supreme Court in State of Goa Vs. M/s Parveen Enterprises 2012 (12) SCC 581 to contend that where reference to the arbitrator is to decide specific disputes enumerated by the parties/court/appointing authority, the arbitrator's jurisdiction is circumscribed by the specific reference and the arbitrator can decide only those specific disputes.

11. Learned counsel for the Respondent contends that order dated 30.04.2019, whereby parties were referred to arbitration did not refer only specified disputes and did not restrict the arbitral proceedings to only the disputes referred, respondent is not precluded from filing a counter claim.

12. Learned counsel for the respondent also relies on the judgment of Parveen Enterprises (supra) in support of his submission.

13. The Supreme Court in of Parveen Enterprises (supra) inter-alia held as under:

"11. Reference to arbitration can be in respect of all disputes between the parties or all disputes regarding a contract or in respect of specific enumerated disputes. Where "all disputes" are referred, the arbitrator has jurisdiction to decide all disputes raised in the pleadings (both claim and counter-claim) subject to any limitation placed by the arbitration agreement. Where the arbitration agreement provides that all disputes shall be settled by arbitration but excludes certain matters from arbitration, then, the arbitration will exclude the excepted matter

and decide only those disputes which are arbitrable. But where the reference to the arbitrator is to decide specific disputes enumerated by the parties/court/appointing authority, the arbitrator's jurisdiction is circumscribed by the specific reference and the arbitrator can decide only those specific disputes.

27. 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 the respondent are entitled to make any claims or counter claims and further entitled to add or amend such claims and counter claims provided they are arbitrable and within limitation.

32. A counterclaim by a respondent presupposes the pendency of proceedings related 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 proceedings being similar to that of a defendant in a suit, he has a 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 to resort to an independent arbitration proceedings or raise the dispute by way of a counterclaim, in the pending arbitration proceedings.

41. The position emerging from the above discussion may be summed up as follows:

(a) Section 11 of the Act requires the Chief Justice or his designate to either appoint the arbitrator(s) or to take necessary measures in accordance with the appointment procedure contained in the arbitration agreement. The Chief Justice or the designate is not required to draw up the list of disputes and refer them to arbitration. The appointment of the Arbitral Tribunal is an implied reference in terms of the arbitration agreement.

(b) Where the arbitration agreement provides for referring all disputes between the parties (whether without any exceptions or subject to exceptions), the arbitrator will have jurisdiction to entertain any counterclaim, even though it was not raised at a stage earlier to the state of pleadings before the arbitrator.

(c) Where however the arbitration agreement requires specific disputes to be referred to arbitration and provides that the arbitrator will have the jurisdiction to decide only the disputes so referred, the arbitrator's jurisdiction is controlled by the specific reference and he cannot travel beyond the reference, nor entertain any additional claims or counterclaims which are not part of the disputes specifically referred to arbitration.

(underlining supplied)

14. The Supreme Court in *Parveen Enterprises* (supra) has held that the Chief Justice or his designate while exercising the powers of appointment under Section 11 is not required to draw up a list of disputes and refer them to arbitration and further where the arbitration agreement provides for referring all disputes between the parties, whether without any exception or subject to exception, the arbitrator would have the jurisdiction to entertain any counterclaim even though it was not raised at a stage earlier to the stage of pleadings before the arbitrator.

15. The Supreme Court further held that the position of a respondent in an arbitration proceedings is 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 to resort to an independent arbitration proceedings or raise the dispute by way of a counterclaim, in the pending arbitration proceedings.

16. Respondent is entitled to raise a counterclaim unless the parties have otherwise agreed and also to amend or add to the counterclaim unless otherwise agreed. Unless the arbitration agreement requires the arbitrator to decide only the specific referred disputes, respondent can file counterclaim and amend or add to the same. Except where arbitration agreement restricts the arbitration to only those disputes which are specifically referred to arbitration, both parties are entitled to make claims or counter claims and further entitled to add or amend such claims or counterclaims provided they are arbitrable and within limitation.

17. Learned counsel for the petitioner fairly concedes that there is no stipulation in the arbitration agreement which restricts reference only of any particular type of disputes or excludes reference of any other dispute.

18. Reference may also be had to the order dated 30.04.2019 in CS(Comm.) 580/2016 wherein this Court has held as under:-

"15. Under these circumstances and also in view of the consent given by Defendant Nos. 1 and 2, an independent Arbitrator is appointed to adjudicate the disputes between the parties. Hon'ble Mr. Justice S. P. Garg (Retd) - (M: 9910384631, Add: D-72, Saket Court Residential Complex, Saket, New Delhi - 110017) retired judge of this Court is appointed as the Sole Arbitrator to adjudicate the disputes between the parties. The claims raised by the Plaintiff in the amended plaint, shall be treated as the Claims before the Arbitrator. Both

parties agree, that the arbitration may be conducted under the aegis of the Delhi International Arbitration Centre (DIAC) and its Rules.

16. None of the observations made, either in the order dated 6th December, 2018 or in today's order would bind the Arbitrator in terms of the adjudication of issues which may arise. All issues and objections are left open to both the parties."

19. Perusal of order dated 30.04.2019 shows that the order does not refer any particular dispute or excludes from reference any particular or other disputes. Rather the Court has held that "None of the observations made, either in the order dated 6th December, 2018 or in today's order would bind the Arbitrator in terms of the adjudication of issues which may arise. All issues and objections are left open to both the parties.", which clearly signifies that there is a general reference of all disputes and issues that have arisen or may arise between the parties.

20. Clearly since there is no restriction either in the arbitration agreement or in the order of reference dated 30.04.2019 with regard to disputes that can be referred or exclusion from reference of certain disputes. Accordingly, the contention of learned counsel for the petitioner that the counterclaims could not have been entertained by the Arbitral Tribunal is not sustainable.

21. The issue as to whether the counterclaims are within limitation or not has already been held by the arbitral tribunal to be a mixed question of fact and law and said issue has been left open to be decided at the time of final adjudication of the arbitral proceedings.

22. I find no merit in the petition or ground to interfere with the impugned order dated 25.08.2020 of the Arbitral Tribunal.

23. The petition is accordingly dismissed.

24. Copy of the order be uploaded on the High Court website and be also forwarded to learned counsels through email by the Court Master.