

Dispute Resolution Hotline

August 05, 2011

MAINTAINABILITY OF COUNTER-CLAIMS

Jurisdiction of Arbitrator Questioned

INTRODUCTION

The Hon'ble Supreme Court ("SC") in the case of State of Goa ("Appellant") vs. Praveen Enterprises ("Respondent")¹ held that counter-claims filed before the Arbitrator are maintainable if the arbitration agreement provides that all disputes between the parties shall be referred to arbitration.

FACTUAL MATRIX

In the present case, the Appellant entered into an agreement dated November 4, 1992 for construction work with the Respondent. However, the agreement was terminated by the Appellant, inter alia, on the ground that Respondent failed to complete the construction work within the extended time period. Clause 25 of the Agreement provided for settlement of disputes by arbitration and the same is reproduced herein below:-

"Except where otherwise provided in the contract, all questions and disputes relating to the meaning of the specifications, designs, drawings and instructions herein before 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, instructions orders or these conditions or otherwise concerning the works, or the execution or failure to execute the same whether arising during the progress of the work or after the completion or abandonment thereof shall be referred to the sole arbitration of the person appointed by the Chief Engineer, Central Public Works Department in charge of the work at the time of dispute.....It is a term of contract that the party invoking arbitrations shall specify the dispute or disputes to be referred to arbitration under this clause together with the amount or amounts claimed in respect of each such disputes."

The Respondent invoked arbitration and gave Notice to the Appellant to appoint an arbitrator as per the terms of Clause 25. The Appellant's failure in appointing an Arbitrator led to Respondent filing an application under Section 11 Arbitration and Conciliation Act, 1996 ("Act") for appointment of arbitrator and accordingly a Sole Arbitrator was appointed. The Arbitrator passed an award on the basis of the claim statement and counter claim.

The Respondent aggrieved by the said award filed an application under Section 34 of the Act challenging the award. The Civil Court, Goa upheld the award however, accepted the objections raised in regard to the counter-claim stating that the Arbitrator could not transcend beyond its scope of reference. The Appellant challenged the same before the Bombay High Court ("Bombay HC") wherein the Bombay HC held that the Arbitrator had no jurisdiction to entertain or allow counter-claim as the same were not placed before the Court in the proceedings under section 11 of the Act and the said counter claim were not referred to arbitration. The same is challenged in appeal before the SC.

APPELLANT'S SUBMISSIONS

It was one of the submissions of the Appellant that in the absence of a bar in the arbitration agreement, they are entitled to raise their counter claims before the Arbitrator though not raised initially under Section 11 proceedings. The Appellant stated that Section 11 of the Act does not contemplate "reference of disputes" by the Chief Justice or his designate and the Bombay HC had committed an error in upholding that in the absence of a reference by the court while considering appointment of arbitrator under section 11 of the Act, the Arbitrator had no jurisdiction to entertain a counter claim.

RESPONDENT'S SUBMISSIONS

The Respondent contended that every claim and counter-claim unless specifically mentioned in the Section 11 application cannot be the subject matter of arbitration. Further, it was put forth by the Respondent that the court should ascertain the precise nature of the dispute prior to appointing an Arbitrator, submitting that claims or counter-claims not referred in the pleadings, is not arbitrable.

The Respondent relying on Section 21 of the Act contended that counter-claims can be entertained by the Arbitrator only if the same has been referred to him with a notice seeking arbitration with regard to such counter claim.

ISSUES

The question before the SC was whether in an arbitration proceeding, a party is precluded from making a counter-claim unless

- it has served a Notice upon the Claimant for referring the disputes in the counter-claim to the arbitration and/or
- had set out the claims in its reply statement to the Section 11 application and the same was referred by the Chief Justice or his designate to the Arbitrator.

DECISION AND RATIONALE

The SC held that Section 11 of the Act requires the Chief Justice or his designate to either appoint Arbitrators or take

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measures as per the appointment procedure and are not required to draw up list of disputes for reference to arbitration. If the arbitration agreement provides for referring all disputes between the parties, the Arbitrator shall have the jurisdiction to deal with counter-claims, though not raised at an earlier stage or at the stage of pleadings. The Arbitrator cannot travel beyond the reference when the arbitration agreement requires only specific disputes to be referred for arbitration, nor can the Arbitrator entertain any additional claims or counter-claims.

In the present case, the arbitration clause required the parties to specify the disputes but does not require the appointing authority to specify or refer the disputes to arbitration. There is no express bar to deciding the counter-claims and in the absence of agreement to contrary, counter-claims are maintainable and arbitrable. The appeal was allowed setting aside the order of the Bombay HC. With regard to the issue of limitation period, the SC analysed the provisions of section 21 of the Act and held that in the absence of specific provision for counter claim the date on which counter-claim is made before the Arbitrator shall be deemed to be the date of institution of the counter-claim for the purpose of limitation.

ANALYSIS

This judgment explains the term '*reference to arbitration*' which includes reference by parties themselves or by an appointing authority as per the arbitration agreement or by the Court on an application by a party. Reference to arbitration may include all disputes between the parties or all disputes with respect to a particular contract or in respect of specific enumerated disputes. If all disputes are referred, the Arbitrator has the jurisdiction to decide all disputes raised in pleadings as per terms of the arbitration agreement.

The SC while discussing the scope of Section 11 stated that it does not require the Chief Justice or his designate to identify the dispute or refer them to the Arbitral Tribunal and thus it is completely baseless to assume than when an Arbitrator is appointed by the Court, the Arbitrator can decide only those disputes raised in the Section 11 application and not the counter-claims. The SC reiterating the provisions of the Act stated that parties are permitted to raise their claims with supporting documents including counter claim to establish their issues and claim reliefs. The discretion is vested with the Arbitrator to decide whether the claims as put forth in the counter-claim are within the scope of the arbitration agreement or not and accordingly adjudicate upon the same. The sole purpose of providing counter-claims is to avoid multiplicity of proceedings and divergent findings.

- **Payel Chatterjee, Vyapak Desai & Vivek Kathpalia**

1 2011 (5) SCALE 137

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